TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 674

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1932

CERTIORARI GRANTED MARCH 14, 1932

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( )

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[fol. 1] [Caption omitted]

[fol. 2]

IN CIRCUIT COURT OF PRAIRIE COUNTY, SOUTHERN DISTRICT

Mrs. Effie K. Simpson, Administratrix of the Estate of A. E. Simpson, Deceased, Plaintiff,

vs.

St. Louis Southwestern Railway Company, Defendant

Complaint at Law

The plaintiff, Mrs. Effie K. Simpson, administratrix of the estate of A. E. Simpson, deceased, for cause of complaint states:

That she is a resident and citizen of Pine Bluff, Arkansas, and that she is the duly qualified and acting administratrix of the estate of A. E. Simpson, deceased, having been appointed such administratrix by the Probate Court of Jefferson County, Arkansas. That the defendant St. Louis Southwestern Railway Company, is a corporation organized under and by virtue of the laws of the State of Missouri, and is engaged in operating a line of railroad transporting passengers and freight for hire in the State of Missouri, Arkansas, Louisiana, Texas and other States in the United States.

Plaintiff states that this is a suit for damages for personal injuries sustained by A. E. Simpson on the 2d day of August, 1930, that resulted in his death, the said A. E. Simpson being in the employ of the defendant, St. Louis Southwestern Railway Company, at the time in the capacity of an engineer operating a freight train, and that this suit is brought under the Federal Employers' Liability Act of 1908, as amended by Congress in 1910, and that plaintiff relies on said Act for a recovery in this case.

[fol. 3] That at the time said injury occurred the deceased, A. E. Simpson, was then and there engaged in interstate commerce, in that he was assisting in operating a freight train that was running from Pine Bluff, Arkansas,

to Texarkana, Arkansas, as an engineer and was injured near McNeil, Arkansas, while in the performance of his duty.

That in said freight train there were various cars that were carrying interstate commerce, carrying freight that originated outside of the State of Arkansas and consigned to points within the State of Arkansas, and carrying freight that originated outside of the State of Arkansas, some of which was consigned to points within the State of Arkansas, and some of which was consigned to other states than the one in which the shipment originated; some of said freight being carried in this manner through the State of Arkansas; that at the time the said A. E. Simpson was injured the defendant, St. Louis Southwestern Railway Company, was engaged in interstate commerce, there being cars in said train in which there was interstate commerce at the time of the accident carrying freight to points in the State of Arkansas from points originating without the State of Arkansas, and also carrying freight passing through the State of Arkansas that originated in a state outside of the State of Arkansas and being carried to another state through the State of Arkansas, the defendant at the time carrying said freight for hire and being then and there a common carrier.

Plaintiff further states that the deceased, A. E. Simpson, was on the 2nd day of August, 1930, in the employ of the defendant, St. Louis Southwestern Railway Company, in the capacity of an engineer and was at work engaged in assisting in running a freight train from Pine Bluff, Ar-
[fol. 4] kansas, to Texarkana, and that said train upon which the deceased was engaged as engineer collided with another train being operated by the defendant about two miles below McNeil, Arkansas, crushing, maiming the said A. E. Simpson in such a manner that after living about four hours he died.

Plaintiff states that the said injuries were caused by the negligence and carelessness of the defendant, St. Louis, Southwestern Railway Company, as follows:

That the deceased was caused to leave the passing track with his train at McNeil and continued his journey south, on account of the carelessness and negligence of operator, Key, who was in charge of the station at McNeil, Arkansas,

for the defendant, in giving to deceased an incomplete and misleading order, thereby causing him to leave said passing track and go out upon the main line; and on account of the carelessness and negligence of Conductor DeMaine, who was in charge of said train in causing a high ball to be given to the engineer from the rear end of said train — approached the south switch of said passing track, thereby directing and causing said engineer to go out on the main line, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died. On account of the conduct of DeMain, conductor upon said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents, and servants of the defendant upon said main line, causing [fol. 5] the deceased to receive injuries from which he thereafter died.

Plaintiff states that said A. E. Simpson was a strong, robust and healthy man, 56 years of age, earning around $4,000 a year, all of which except his personal expenses he contributed to the support of his family. There are now surviving him as his widow and sole heirs at law and next of kin, Mrs. Effie K. Simpson, widow, Mrs. Josephine Hopkins (née Simpson), Marie Simpson, Esther Simpson and Alberta Simpson, the said widow and children being dependent upon him for support and constituted his family to whom he contributed the amount aforesaid for support and maintenance; and that from the time the said A. E. Simpson received the injuries aforesaid until the time of his death he was conscious and suffered great and excruciating pain of body and anguish of mind, which said injuries were caused through the negligence and carelessness of the defendant, its agents and servants as aforesaid, and that by reason of the loss of contribution by the deceased for support and maintenance and for the pain of body and anguish of mind endured by the deceased from the time of his injury until he died, the said widow and children were damaged in the sum of $50,000.00.

Wherefore, plaintiff, Mrs. Effie K. Simpson, as administratrix of the estate of A. E. Simpson deceased, prays judgment against the defendant, St. Louis Southwestern Railway Company, for the sum of $50,000.00 for the benefit of said widow and children and for costs and all general relief.

(Signed) J. F. Holtzendorff, (Signed) Pace & Davis, Attorneys for Plaintiff.

[fol. 6] Summons issued Jany. 31, 1929.
Summons served Jany. 31, 1929.

[fol. 7] IN CIRCUIT COURT OF PRAIRIE COUNTY

[Title omitted]

MOTION TO REQUIRE PLAINTIFF TO PLEAD MORE DEFINITELY

In the complaint herein plaintiff charges that defendant was guilty of negligence because one, Key, in charge of defendant's station at McNeil, gave to deceased, A. E. Simpson, "an incomplete and misleading order", and that thereby said decedent was caused to leave the passing track and run his train out upon the main line, resulting in the collision mentioned in the complaint.

This defendant has no knowledge or information as to any incomplete or misleading order thus delivered by any one to said decedent. The defendant does not know but has the right to know to what order plaintiff refers and to know its contents, and to require plaintiff to plead in what respect, to what extent and why said order was incomplete and misleading, and in what manner and how said decedent construed said order.

Defendant cannot intelligently prepare its answer nor present its defense herein without the information called for by this motion.

[fol. 8] Wherefore defendant prays that plaintiff be required to plead more definitely as herein suggested and for all other proper relief.

(Signed) Lamb & Adams, Attorneys for Defendant.

[fol. 9] IN CIRCUIT COURT OF PRAIRIE COUNTY

[Title omitted]

ANSWER

Defendant, St. Louis Southwestern Railway Company, for its answer to the complaint herein, admits that plaintiff is a resident of Pine Bluff, but has no knowledge or information sufficient to form a belief as to whether she is administratrix as alleged in the complaint; admits that it is a corporation, operates a line of railway as a common carrier through the States mentioned, that it is engaged in interstate commerce, and at the time plaintiff's decedent was injured he was assisting in operating a freight train carrying interstate commerce; that on August 2nd, the freight train of which said decedent was in charge as engineer collided with another freight train of defendant a short distance south of McNeil, and that by said collision said decedent was so injured and that such injuries resulted in his death about four hours later.

Defendant denies that said Simpson was caused to leave the passing track with his train and continue his journey south on account of the carelessness or negligence of Operator Key, in charge of the station at McNeil, or the carelessness or negligence of any other employee of defendant in giving to deceased any incomplete or misleading order [fol. 10] thereby causing him to leave said passing track and go out upon the main line. It denies that any incomplete or misleading order was given to said decedent by said Key or any other person, and denies that any order given to said Simpson directing him in handling and operating his train was misleading or incomplete for any reason contended by plaintiff. It denies that Conductor DeMain of said train gave or caused a high ball to be given to said decedent from the rear end of said train as it approached the south switch of any passing track or that by reason of any such high ball or signal of any kind decedent was directed or caused to go out on the main line from said siding at McNeil. It denies that it was guilty of any negligence or liable to plaintiff in damages because said conductor failed to apply the air brakes upon said train and stop it, and denies that in failing to so stop said train said conductor was guilty of any careless, negligent or reckless conduct.

Defendant denies that the collision in which said decedent was injured, resulted from the carelessness or negligence of Conductor DeMain, Operator Key, or any other servant or employee of defendant save an- except said A. E. Simpson, and says that it was his negligence and carelessness alone that resulted not only in his injuries and death, but in the deaths of several others of his co-employees and in the destruction of property of the defendant of the value of more than one hundred thousand dollars.

Defendant says that the primary and only negligence resulting in said collision was that of said Simpson in running [fol. 11] and operating his train as he at the time well knew, in violation and disobedience of orders and directions given to him by defendant.

Defendant denies that the earnings of said decedent amounted to Four Thousand Dollars ($4,000.00) per annum but says his earnings through the entire year preceding his death amounted to but Three Thousand Six Hundred and Ninety and 96/100 Dollars ($3,690.96). It has no knowledge or information sufficient to form a belief as to any amounts contributed by said Simpson to the support or maintenance of his family, nor as to whether Josephine Hopkins, Marie Simpson, Esther Simpson, Alberta Simpson are children of, or any of them were dependent upon him for support.

It denies that at any time between the time of his injury and death said Simpson was conscious or suffered any conscious pain, and denies that by reason of any of the matters or things alleged in the complaint, defendant is liable or indebted to the plaintiff in the sum of Fifty Thousand Dollars ($50,000.00) or any other sum.

Wherefore, having fully answered, defendant prays that it be discharged with costs.

(Signed) Lamb & Adams, Attorneys for Defendant.

[fol. 12] In Circuit Court of Prairie County

[Title omitted]

Motion for New Trial—Filed March 3, 1931

Comes the defendant, by its attorneys, Lamb and Adams, and moves the Court to set aside the verdict of the jury, and

the judgment of the court, rendered herein, in the above entitled cause, and for reasons state:

No. 1. Because the verdict rendered herein, is contrary to the law.

No. 2. Because the verdict rendered herein, is contrary to the evidence.

No. 3. Because the verdict rendered herein, is contrary to both the law and the evidence.

No. 4. Because the verdict rendered herein, is excessive under the proof and not responsive to the issues involved.

No. 5 Because the court erred in refusing to give defendant's requested instruction No. 1 over the objection and exception of defendant.

No. 6. Because the court erred in refusing to give defendant's requested instruction No. 3 over the objection and exception of the defendant.

[fol. 13] No. 7. Because the court erred in refusing to give defendant's requested instruction No 4 over the objection and exception of defendant.

No. 8. Because the court erred in refusing to give defendant's requested instruction No. 4 "A" as written.

No. 9. Because the court erred in modifying defendant's requested instruction No 4 "A" and giving as modified at the request of plaintiff, over the exception of defendant.

No. 10. Because the court erred in refusing to give defendant's requested instruction 4 "AA" over the objection and exception of defendant.

No. 11. Because the court erred in refusing to give defendant's requested instruction No. 5 over the objection and exception of defendant.

No. 12. Because the court erred in refusing to give defendant's requested instruction No. 6 over the objection and exception of defendant.

No. 13. Because the court erred in refusing to give defendant's requested instruction No. 7 over the objection and exception of defendant.

No. 14. Because the court erred in giving plaintiff's requested instruction No. 1 over the objection and exception of defendant.

No. 15. Because the court erred in giving plaintiff's requested instruction No. 2 over the objection and exception of defendant.

No. 16. Because the court erred in giving plaintiff's re-
[fol. 14] quested instruction No. 3 over the objection and exception of defendant.

No. 17. Because the court erred in giving plaintiff's requested instruction No. 4 over the objection and exception of defendant.

No. 18. Because the court erred in giving plaintiff's requested instruction No. 5 over the objection and exception of defendant.

No. 19. Because the court erred in giving plaintiff's requested instruction No. 6 over the objection and exception of defendant.

No. 20. Because the court erred in giving plaintiff's requested instruction No. 7 over the objection and exception of defendant.

No. 21. Because the court erred in giving plaintiff's requested instruction No. 9 over the objection and exception of defendant.

No. 22. Because the court erred in giving plaintiff's requested instruction No. 10 over the objection and exception of defendant.

No. 23. Because the court erred in giving plaintiff's requested instruction No. 11 over the objection and exception of defendant.

No. 24. Because the court erred on the motion of defendant to exclude and withdraw from the jury, the evidence of witnesses Craig and Dorman, with reference to the conversation between themselves and between themselves or either of them and Conductor DeMain, with reference to the [fol. 15] application of the air in setting the brakes from the caboose.

No. 25. Because the court erred in refusing on the motion of the defendant to exclude and withdraw from the jury the statement in evidence of witness Craig and witness Dorman, with reference to train order pertaining to train No. 18. The same being train order No. 104.

No. 26. Because the court erred in permitting witness Block, over the objection and exception of defendant, to testify to and repeat words and language of Simpson as to his injuries, pain and suffering, and anticipated death and with reference to his wife and other members of his family.

No. 27. Because the court erred in permitting witness Burns, over the objection and exception of defendant, to testify to and repeat words and language of Simpson as to his injuries, pain and suffering, and anticipated death and with reference to his wife and other members of his family.

No. 28. Because the court erred on motion of defendant to exclude and withdraw from the jury, the evidence of witnesses Screeton, McLain and Wilkins, with reference to distances south of McNeil from which a train could be seen at the switch at the south end of the yards at McNeil.

No. 29. Because the court erred over the objection and exception to withdraw and exclude from the jury the evidence in the case tending to show in what distance train Extra 775 South could have been stopped, and in what distance train No. 18 could have seen a train standing on the main line 1760 feet south of the switch.

[fol. 16] No. 30. The objections and exceptions to the instructions requested by plaintiff were made by defendant, excepted to each said instruction and its exceptions duly saved and entered of record.

No. 31. The exceptions by defendant to the refusal of the court to give to the jury its requested instructions were duly made as to each said instruction, and exceptions thereto, were duly made and entered of record.

Wherefore defendant prays the court to set aside the verdict of the jury rendered and the judgment entered by the court, and grant it a new trial.

(Signed) Lamb & Adams, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 17] IN CIRCUIT COURT OF PRAIRIE COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

On this day comes the defendant, The St. Louis Southwestern Railway Company by its attorneys, Lamb and Adams, and presents to the court their motion for a new trial, which was filed herein on the 3rd day of March, 1931, and upon consideration of said motion, the court doth find that same *dhoulb* be overruled.

It is therefore, considered, ordered and adjudged by the court that the motion for a new trial filed herein on the 3rd day of March, 1931, be and the same is hereby overruled.

To the action of the court in overruling said motion for a new trial, the defendant excepted to said ruling and asked that their exceptions be noted of record, which is accordingly done, and in overruling said motion for a new trial herein, said defendant prays an appeal to the Supreme Court of Arkansas, which appeal was by the court granted and said defendant given 90 days within which to prepare and file its Bill of Exceotions in said cause.

This 3rd day of March, 1931.

(Signed) Wm. J. Waggoner, Circuit Judge of the 17th Judicial Circuit of Arkansas.

[fol. 18] IN CIRCUIT COURT OF PRAIRIE COUNTY, SOUTHERN DISTRICT

EFFIE K. SIMPSON, Administratrix of the Estate of A. E. Simpson, Deceased, Plaintiff,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant

JUDGMENT

On this day this cause came on for hearing and the plaintiff appeared in person and by her attorneys, Pace & Davis and J. F. Holtzendorff, and the defendant appeared by its attorneys, Lamb & Adams, and both parties having announced ready for trial the cause was submitted to twelve

men drawn from the regular panel of jurors, who were qualified to hear and determine said cause, and said jury after hearing the evidence, the argument of counsel and the instructions of the court, retired to consider their verdict and in due time returned into court the following verdict:

"We the jury find for the plaintiff for the benefit of Mrs. A. E. Simpson, Widow, and Marie Simpson, Esther Simpson and Alberta Simpson in the sum of $28,000.00 as damages.

A. F. Seidenstricker, Foreman.

It is therefore by the court considered, ordered and adjudged that the plaintiff, Effie K. Simpson, Administratrix of the Estate of A. E. Simpson, deceased, do have and recover of and from the defendant, St. Louis Southwestern Railway Company (a corporation) the sum of Twenty-eight Thousand Dollars ($28,000.00) for the benefit of Effie K. Simpson as widow, Marie Simpson, Esther Simpson and Alberta Simpson, his children, and for all of her costs laid [fol. 19] out and expended, for which let execution issue; that a lien for said judgment be declared upon the roadbed, buildings, equipments, income, franchise, right-of-way, and all other appurtenances of said railroad superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees and beneficiaries under trusts, or owners.

[fol. 20] In Circuit Court of Prairie County, Southern District

Mrs. Effie K. Simpson, Administratrix of the Estate of A. E. Simpson, Deceased, Plaintiff,

vs.

The St. Louis Southwestern Railway Company, Defendant

Bill of Exceptions

Be it remembered that on the 3rd day of March, 1931, the same being a regular day of the March Term of this

court for the year 1931, the above cause having been reached on its regular call, the plaintiff and attorneys, and attorneys for defendant appeared in person and announced ready for trial.

Thereupon, a jury of the regular panel of petit jurors for said term was duly selected, empaneled and sworn to try the issues of fact arising, and the plaintiff and defendant introduced the folloeing testimony to sustain the issues in their behalf:

[fol. 21] [Title omitted]

ABANDONMENT OF ALL ISSUES EXCEPT DISCOVERED PERIL

Mr. Pace, counsel for plaintiff states: In reply to the motion made by the defendant to make complaint more definite and certain, counsel for plaintiff in this case relies alone on the doctrine of discovered peril and that all other allegations of negligence in the complaint will be stricken out.

Mr. Lamb, counsel for defendant, in reply to Mr. Pace, states: Thereupon the motion of the defendant is sustained and plaintiff declines to plead further the portion of the complaint mentioned in the motion and the same is hereby stricken out.

[fol. 22] Mrs. EFFIE K. SIMPSON, after first having been duly sworn, testifies as follows:

Direct examination.

By Mr. Pace:

Q. Please state your name to the jury?
A. Mrs. Effie K. Simpson.
Q. Where do you live?
A. My home is in Pine Bluff, but for the present I am living in Little Rock.
Q. Are you the wife of A. E. Simpson, deceased?
A. Yes, sir.
Q. Was he in the employ of the St. Louis Southwestern Railway along about August the 2nd, 1930?
A. Yes, sir.
Q. What position did he hold?

A. Locomotive engineer.

Q. How long had he held the position of locomotive engineers?

A. 30 years.

Q. Had he been engineer for this company 30 years?

A. Yes, but he was fireman 5 years.

Q. How long would that make?

A. 35 years.

Q. 5 years as fireman, and 30 years as locomotive engineer; is that correct?

A. Yes, sir.

Q. About how long have you lived in Pine Bluff?

A. About 35 years.

Q. How old was Mr. Simpson at the time he was killed?

[fol. 23] A. 56 years old.

Q. Please state to the jury how many children you have?

A. I have 4 daughters; 3 living at home and one married.

Q. How long has she been married?

A. 14 years.

Q. The other 3 reside with you?

A. Yes, sir.

Q. And have always resided with you?

A. Yes, sir.

Q. What are their name-, please mamm?

A. Marie, Est-er and Alberta.

Q. What was Mr. Simpson earning at the time of his death, and 8 or 10 years prior thereto?

A. Around $300.00 per month. Sometimes more and sometimes lee-.

Q. Would it average $300.00 per month.

A. Yes, sir.

Q. $3600.00 yearly?

A. About that, yes.

Q. Did you handle a part of his checks that he drew from the Railroad Company?

A. Yes, sir.

Q. Do you know about what his earnings would run then?

A. Yes, sir; it would run $3600.00 a year, anyway.

Q. Please state to the jury where Mr. Simpson ran to on his run; from where to where.

A. From Pine Bluff to Texarkana, and from Texarkana to Shreveport, and then back to Texarkana, and from Tex-

[fol. 24] arkana back to Pine Bluff.

Q. Would he make round trips, or how, please mam?

A. Yes, he would make round trips, but when he had to go on in to Shreveport, he wouldn't get back to Pine Bluff for 3 or 4 days.

Q. On his return to Pine Bluff he would pull a train on his return, would he?

A. Yes, sir.

Q. Did you go down to the scene of the wreck?

A. No, sir; I didn't see the wreck.

Q. What time was it that your husband left home before the wreck?

A. About 2 o'clock in the morning.

Q. On the morning of second of August?

A. Yes, sir.

Q. When was the last time you saw him?

A. That was the last time.

Q. Where, please mam?

A. At home.

Q. At home in Pine Bluff?

A. Yes, we took him to the round house in the car, the girls and I. We took him down to go out on his run.

Q. At what time did you say that was?

A. About 2 o'clock in the morning.

Q. Where did you leave him?

A. At the round house.

Q. He left early in the morning, you and your daughters drove him to work?

[fol. 25] A. Yes, sir.

Q. How far from your home to the round house, please mam?

A. About a mile.

Q. And that was the last time you saw him?

A. Yes, sir.

Q. When did you first hear of his injuries?

A. About 1 o'clock the next day.

Q. You mean the same day he was injured?

A. Yes, sir.

Q. What did you do when you learned of his injuries?

A. We got ready as quickly as we could, the daughters and I. We left Pine Bluff about 2 o'clock, and when we got down there he had been dead about 20 minutes.

Q. He died before you reached his bedside?

A. Yes, sir.

Q. Where did he die?

A. At Camden, in the hospital.

Q. He was injured sometime before 12 o'clock and died some time between 3 and 4 o'clock?

A. Yes, sir.

Q. What did you *fo* when you discovered he was dead?

A. Two of the daughters went over and made arrangement for his casket. I didn't go because I felt *oo* bad.

Q. Where was the body shipped for burial?

A. To Pine Bluff.

Q. He was buried at Pine Bluff?

A. Yes, sir.

[fol. 26] Q. Who conducted the funeral?

A. A Mr. Webb and Mr. Robinson, undertakers. We had the funeral at the church.

Q. What church, please mam?

A. The Baptist.

Q. You say that Mr. Simpson left about 2 o'clock in the morning; when did you expect him back?

A. The next morning.

Q. What day of the week was that, if you remember?

A. It was Saturday morning.

Q. He left Saturday morning about 2 o'clock?

A. Yes, sir.

Q. And you expected his return the next morning?

A. Yes, sir.

Q. What time would he be back?

A. Sometime before noon.

Q. In time for dinner?

A. Yes, sir.

Q. When he made these trips to Texarkana, and then on to Shreveport; how long would he be away from home?

A. When he just went to Texarkana, he would go down one day and return the next, but when he went on in to Shreveport, he would be gone several days.

Q. But when he just went to Texarkana, you say that he would return the next day?

A. Yes, sir.

Q. About how many trips would he make per week?

[fol. 27] A. Between 3 and 4 trips a week.

Q. Do you know about what his expenses were on these trips, each trip?

A. I don't think it would run over $20.00 per month as he would take his lunch with him.

Q. Not over $20.00 per month?

A. No, sir.

Q. Did he spend much money?

A. No, he was very conservative.

Q. What did his clothes cost; did he wear expensive clothes?

A. No, he was very saving with everything.

Q. Did he have many clothes?

A. No. He just had his work clothes and only one dress suit.

Q. About what would they cost him each year; how much would it cost to keep him in clothes each year?

A. Not over $100.00.

Q. How would he go dressed?

A. He wore his dress suit to the round house and then he changed to his work clothes. They had a place to keep their work clothes down at the round house; they had a locker to keep their work clothes in.

Q. On his run, he would wear what is commonly called overalls?

A. Yes, sir.

[fol. 28] Q. And that was he wearing when he got killed?

A. Yes, sir.

Q. What did he do with the rest of his earnings?

A. He paid our living expenses with it.

Q. For yourself and the girls?

A. Yes, sir.

Q. He supported the family with it.

A. Yes, sir.

Q. Did he take an interest in his daughters?

A. Yes, sir.

Q. Did they have a high school education?

A. Yes, sir.

Q. They graduated, did they?

A. Yes, sir; and they took music lessons too.

Q. He was very proud of his children?

A. Yes, sir.

Q. You were appointed Administratrix of the Estate, were you not?

A. Yes, sir.

Q. In Jefferson county?

A. Yes, sir.

Q. And you are acting as Administratrix at the present time?

A. Yes, sir.

If it please the court, we would like to introduce this letter of Administration.

The Court: (All right it may be introduced.)

[fol. 29] The same is introduced, and for identification is marked Exhibit "A."

I believe that is all for the present.

Cross-examination.

By Mr. Lamb:

Q. What is your age, Mrs. Simpson?

A. I am 57 years old.

Q. What is the age of Miss Marie?

A. 27.

Q. And Miss Ester?

A. 25.

Q. And Miss Alberta?

A. 23.

Q. You say that Mr. Simpson was earning on an average of $300.00 per month as Engineer?

A. Yes, sir.

Q. And you think that $20.00 per month would cover his expenses while he was away from home?

A. Yes, sir.

Q. And $100.00 per year for his clothing; that would be $8.00 and a fraction per month for his clothing?

A. Yes, sir.

[fol. 30] EXHIBIT "A"

Letters of Administration, Section 32, Kirby's Digest

STATE OF ARKANSAS,
County of Jefferson:

Estate of A. E. Simpson, Deceased

The State of Arkansas to all persons to whom these presents shall come, Greeting:

Know ye that whereas A. E. Simpson, of the county of Jefferson and State of Arkansas, died intestate, as it is said,

on or about the 2nd day of August, A. D. 1930, having at the time of his death, personal property in this State, which may be lost destroyed or diminished in value, if speedy care be not taken of the same. To the end, therefore, that the said property may be collected, reserved and disposed of according to law, we do hereby appoint Effie K. Simpson, Administratrix of all and singular the goods and chattels, rights and credits, which were of the said A. E. Simpson at the time of his death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and, in general, do and perform all other acts and things which are, or hereafter may be required of her by law.

In testimony whereof I, L. T. Sallee, Clerk of said court, in and for the county of Jefferson aforesaid, have hereunto set my hand and affixed the seal of said court, at my office, in Pine Bluff, this 8th day of November, 1930.

L. T. Sallee, Clerk, by Joe L. McEnan, D. C.

[fol. 31] I, L. T. Sallee, Clerk of Jefferson County, do hereby certify that the foregoing was filed in my office for record, on the 8th day of November, 1930, having the words E*ar*sed interlined, and that same is now duly recorded.

Witness m*a*y hand this 8th day of November, 1930.

L. T. Sallee, Clerk, by Joe L. McCenan, D. C.

Effie K. Simpson, Admx. Estate A. E. Simpson.

Cross-examination:

Q. Then his total expenses would be $28.00 per month?

A. Yes, sir.

Q. Then if he earned $300.00 per month, that would leave him $272.00 left out of his wages each month?

A. Yes, sir.

Q. Your clothes cost you more than Mr. Simpson's?

A. Yes, some more.

Q. Do the girls work; are they employed in any way?

A. Yes, sir; some of them.

Q. What do they do?

A. One is a stenographer, but she doesn't have very regular work.

Q. For whom does she work?

A. Sam Graves. She did work for him, but he cut off a number of his girls, and she was one of them.

Q. Which one was that?

A. Marie.

[fol. 32] Q. Where does Ester work?

A. For the watch inspector.

Q. Is she employed regularly?

A. Yes, sir.

Q. What is her compensation, please?

A. She earns $20.00 per week.

Q. Is Miss Elberta employed?

A. Yes, she works in a drug store.

Q. At what compensation, please?

A. $15.00 per week.

Q. Is she employed regularly?

A. Yes, sir.

Q. Was there any part of this income saved?

A. Yes, they had some building and loan stock but they had to cash it in.

Q. I mean was there anything saved out of Mr. Simpson's earnings?

A. No, everything is too high to save anything. It costs so much to live and pay expenses.

Q. Had you invested any money in a home?

A. Yes, but we sold it and haven't bought one since.

Q. Did Mr. Simpson carry any form of investments; Building and Loan or anything likewise?

A. No, sir.

Q. You say—two of the girls work regularly; do they buy their own clothes?

A. Yes, but they didn't contribute any towards the home expenses.

[fol. 33] Q. Do you mean to tell the jury, that with one girl earning $15.00 per week, another earning $20.00 and another one irregularly employed, they clothed themselves, do you mean to tell the jury your household expenses were $272.00 per month?

A. They had Building and Loan to pay, and other things to pay. It took every cent they earned, besides that they haven't been working regularly. They have been cut off.

(No further questions.)

Redirect examination.

By Mr. Pace:

Q. Since this recent depression, have they been able to get a position of any kind?

A. No, sir.

Q. Have they been able to get work since their father's death?

A. No, and they are not working at the present time.

Q. Mr. Lamb asked you awhile ago if they were regularly employed and you said that two of them were regularly employed; what you meant, was that they were regularly employed but they were not regularly employed at the present time?

A. No, they are not working at all now.

Q. And you say that they haven't been able to get employment since the death of your husband?

A. No, sir.

Q. You say that they were cut off?

[fol. 34] A. Yes, sir.

Q. Since their father's death?

A. Yes, sir.

Q. But tried to get work and failed?

A. Yes, sir.

By Mr. Lamb: We move that the question with reference to being able to get employment since his death be excluded from the jury.

Mr. Pace: All right, Mr. Lamb, I will withdraw it.

Mr. Pace: I believe that is all.

Witness excused.

[fol. 35] L. W. Craig, after first having been duly sworn, testified as follows:

Mr. Pace:

Q. Please state your name to the jury?

A. L. W. Craig.

Q. Where do you live, Mr. Craig?

A. Pine Bluff.

Q. How long have you lived there?

A. About 15 years.

Q. Were you employed by the St. Louis Southwestern Railway on August 2nd, 1930?

A. I was.

Q. In what capacity, please.

A. As brakeman.

Q. Did you know Mr. Simpson during his life time?

A. Yes, sir.

Q. How long had you known him prior to his death, please?

A. Ever since I hired out to the Cotton Belt.

Q. How long had you worked for this company?

A. Since November 10, 1918.

Q. Since November 10th, 1930?

A. Yes, sir.

Q. Had you worked continuously up until August, 1930?

A. No, sir.

Q. What did you do outside of your regular work?

[fol. 36] A. A part of the time I was cut off of the board.

Q. Did you stay in the employ of the company?

A. Yes, sir.

Q. You didn't do any railroading during the time you was cut off of the board?

A. Yes, I worked for the Missouri Pacific some.

Q. How long, please?

A. I believe I worked for the Missouri Pacific 47 days to be exact.

Q. You knew Mr. Simpson well in his life time did you?

A. Yes, sir.

Q. Had you run with him out on the road?

A. Yes, a great deal.

Q. State whether or not you were one of the brakemen on Extra 775 that left Pine Bluff on the morning of August 2nd, for Texarkana?

A. I was.

Q. Was Mr. Simpson the engineer on that train?

A. He was.

Q. Do you know who the conductor was on that train?

A. Yes, Mr. Demaine.

Q. Who was the other brakeman?

A. Mr. Dorman.

Q. What position did you occupy?

A. Swing brakeman.

Q. Who was the rear-end brakeman?

A. Mr. Dorman.

[fol: 37] Q. Who was the head brakeman?

A. Mr. McKinzie.

Q. Who was the fireman?

A. Mr. Hilborn.

Q. State whether or not train No. 775 was an Extra train running under train orders?

A. Yes, sir, it was.

Q. Now, with reference to train No. 18, was that a freight train also?

A. Yes, sir.

Q. This train No. 18 was running from where to where, please?

A. From Texarkana to Pine Bluff.

Q. And Extra 775 was running from where to where?

A. From Pine Bluff shops to Pine Bluff yards.

Q. When you left Pine Bluff did you have any orders with reference to train No. 18?

A. Yes, sir.

Q. What was the orders you had when you left Pine Bluff?

A. We had an order that gave us rights over 18 from Pine Bluff to cross over at McNeil.

Q. Extra 775 had rights over train No. 18 Pine Bluff shops to cross over at McNeil, is that correct?

A. Yes, sir.

Q. Those were the orders your train had?

A. That was some of them.

Q. But I mean as far as No. 18 is concerned.

[fol. 38] A. Yes, sir.

Q. You say that Demaine was the conductor on Extra 775?

A. Yes, sir.

Mr. Lamb: I don't see the purpose of that examination. Here is the original order Mr. Pace, if that will aid you any, you may have it.

Mr. Pace: I don't believe I will need that Mr. Lamb; if you care to, you can keep it for your cross-examination. I want to show in a general way, the situation. If you care to, you may introduce the specific order. I will have no objections.

Mr. Pace, continuing direct examination:

Q. I believe you state- awhile ago that Extra 775 had right over No. 18 Pine Bluff shops to cross over at McNeil. Am I correct about that Mr. Craig?

A. Yes, sir.

Q. Please tell the jury about what time you arrived at McNeil?

A. It was 11:38 A. M. something like that. It might have been 11:40. I don't remember the exact time, however.

Q. Anyway, it was between 11 and 12 o'clock?

A. Yes, sir.

Q. When you arrived at the cross over at McNeil, what was done, please?

A. We came to a stop and headed in.

Q. You went over from the main track over in what is known as the passing track. The cross over at McNeil?

A. Yes, sir.

Q. At the cross over at McNeil?

[fol. 39] A. Yes, sir.

Q. You were going in a general southward direction; from the north to the south?

A. Yes, sir.

Q. On which side of the main line was this passing track?

A. On the left hand side going south.

Q. That would be on the east side?

A. Yes, sir.

Q. On which side of the main line was the depot located?

A. On the right hand side.

Q. Then the main line was between the passing track and the depot; is that correct?

A. Yes, sir.

Q. Now, when you got to the McNeil cross over switch where you headed in to get on the passing track, you just go ahead in your way and tell what occurred, please. When you arrived there at this cross over, after you headed in and what occurred on down as you proceeded down this passing track?

A. We arrived at McNeil about 11:38 A. M. I had been riding on the left hand side of the caboose up in the cupola. After we stopped to head in, into the passing track, Mr. Dorman had been riding on the right hand side of the cupola, so he got down out of the cupola to throw the switch behind us after he had headed in. I got out of my side and moved [fol. 40] over on the side where Dorman had been riding to see what position the train order board was in. I saw that the train order board was in a stop position, so we moved on down the passing track and when the caboose cleared the

main line, Dorman threw the switch behind us and caught the caboose.

Q. That was after you had left the main line and headed in on the passing track at the cross over at McNeil?

A. Yes, sir.

Q. As I understand it this cross over is away on back north of the depot where it leaves the main line?

A. Yes, sir.

Q. It is some distance north?

A. Yes, sir; and there is also a cross over down near the center of the passing track.

Q. Some where near the center?

A. Yes, sir.

Q. After you had headed in, and come on down this passing track, please explain to the jury the situation; how you went down the passing track and what occurred?

A. After the switch was thrown behind us, Dorman threw the switch, I saw that the train order board was in a stop position. The local was standing on the main line headed in the same direction as we were, standing in front of the depot. There was some one standing out but I don't know who it was, I suppose whoever it was, he was handing up [fol. 41] orders to the front end. Just a little later, Operator Key handed up an order to Dorman.

Q. Key was the operator at McNeil station?

A. Yes, sir.

Q. Now, where was brakeman Dorman?

A. He was standing on the right hand side of the rear steps of the caboose.

Q. All right, go ahead?

A. I was up in the cupola looking down, so I hollered out "No. 18 isn't here yet." At that time the local was still standing on the main line. I says, "If you haven't got anything more on No. 18 you had better stop." He didn't say anything. By that time Dorman had gone out of my sight. I don't know what happened to him. I immediately got down out of the cupola and I met the conductor coming in at the door, so I ask him what he had on No. 18.

Mr. Lamb: If it please the court, I don't know what the purpose is for introducing this evidence at this time, but I want to reserve the right to exclude it upon the grounds that it will become incompetent with further developments.

Court: I will let him introduce it at this time, but if it appears to the court that it is incompetent, the court will exclude it.

Mr. Pace, continuing direct examination:

Q. All right, go ahead, Mr. Craig. I believe you stated that you met conductor Demaine coming in at the door?

A. Yes, I asked him what he had on No. 18, and he says, "We have a meet with Second No. 18 at Stamps. I says, [fol. 42] "If you haven't got something on No. 18, you haven't got it; pull the air."

Mr. Lamb, interrupting:

Q. That was No. 18?

A. Yes, sir.

Mr. Pace:

Q. Go ahead, please?

A. He told me to hand him the train orders that we had received out of Pine Bluff.

Q. Those were the orders you had received at Pine Bluff?

A. Yes, and out on the line.

Q. Go ahead?

A. I rushed up into the cupola and got the orders; we kept them on clip board; I rushed up into the cupola and got the orders and handed them to him, and he had all of the orders in his hands. The train was then getting a little faster.

Q. Did the conductor have the orders in his hands until the wreck occurred?

A. Yes, sir.

Q. And while it occurred?

A. Yes, sir.

Q. You told him when you told him that if he didn't have anything on No. 18 he didn't have it. What did he say?

A. He told me to hand him the orders. And he said that he had a meet with Second No. 18 at Stamps. I says, if you didn't get something on No. 18 here, you didn't have it.

Q. If he didn't get an order there at McNeil to meet No. 18 somewhere else, he didn't have it; to pull the air?

[fol. 43] Mr. Lamb: We object to the leading question; the witness didn't state that. Let the witness state what occurred.

Court: He is your witness Mr. Pace, don't lead the witness.

Mr. Pace, continuing direct examination:

Q. I don't think we understood him when he met the Conductor coming in the door of the caboose. I would like for you to state what was said when he came in at the door?

A. When he came in at the door of the caboose, I ask him what he had on No. 18, he told me that he had a meet with Second 18 at Stamps. I says, "If you didn't get something on No. 18 here, you haven't got it. Pull the air. He told me to hand him the orders out of the cupola that we had received out of Pine Bluff.

Q. And you went up in the cupola and got the train orders, came down and handed them to him; is that correct?

A. Yes, sir.

Q. That is what I wanted to get straightened out. Where is the cupola on a caboose; or that caboose?

A. Up in the top part of the caboose.

Q. Where was the caboose at that time with reference to the depot; the time you got down out of the cupola and handed the conductor the orders?

A. Near the highway road crossing; just a little south of the highway crossing.

Q. Do you mean the public highway crossing that goes [fol. 44] on down to Magnolia?

A. Yes, sir.

Q. That is south of the depot?

A. Yes, sir.

Q. About how far south of the depot is that crossing?

A. Just a short distance; I couldn't say exactly.

Q. The switch where you went out on the main line is how far south of the highway crossing?

A. About 30 or 35 car lengths.

Q. On down to the switch where you went on to the main line?

A. Yes, sir.

Q. What did you mean when you told him to pull the air?

A. I meant for him to stop the train.

Q. Was there some apparatus on the caboose where the air could be applied?

A. Yes, sir.

Q. What was it, please?

A. Air valve.

Q. Where was it located?

A. In three different places on the caboose.

Q. Where, please?

A. There is one located on the north end, one on the south end and one up in the cupola of the caboose.

Q. How long would it take to work either one of those apparatuses?

A. That depends on where you are.

[fol. 45] Q. If you could reach one?

A. Just a short time.

Q. Can you give the jury some idea?

A. All that is necessary is to press down on the valve.

Q. That releases the air and it immediately takes effect?

A. Yes, sir. It locks the wheels of the train.

Q. You stated that he had no other orders on No. 18 except what he had gotten at Pine Bluff?

A. None that I knew anything about.

Q. While you were standing there with Conductor Demaine, did anybody else come in?

A. Yes, Dorman came in, however, I don't think he came in until we had passed over the south switch.

Q. Dorman was the other brakeman?

A. Yes, sir.

Q. When he came in, tell the jury what he said to Conductor Demaine?

A. He told him to pull the air and read the orders later.

Q. He told him to look at the train orders later. Pull the air?

A. Yes, sir.

Q. Did the Conductor do that?

A. No, sir.

Q. What was the length of this train?

A. It had 43 cars and the caboose.

Q. Were the cars loaded or empty, or both?

A. Some loaded and some empty.

[fol. 46] Q. You don't know the proportion?

A. No, sir.

Q. Some were loaded and some were empty?

A. Yes, sir.

Q. In coming down to McNeil that morning, had it become necessary for the air to be pulled from the caboose and the train stopped between Pine Bluff and McNeil; did you have an occasion to pull the air before you arrived at McNeil that morning?

A. Yes, sir.

Q. For what purpose was the air pulled?

A. On account of a derailment.

Q. Do you mean that a car had left the track in your train?

A. Yes, sir.

Q. Who discovered the fact that this car had left the track in your train?

A. I did.

Q. Who pulled the air?

A. Dorman.

Q. Did the train stop after the air was applied?

A. Yes, sir.

Q. Did you re-rail the car and then proceed?

A. Yes, sir.

Q. May I ask, if the air had been pulled at the time you told Conductor DeMaine to pull it, how far would the train have run before it would have stopped?

A. Do you mean the first time, or when?

[fol. 47] Q. I mean when you told him to pull the air at McNeil.

A. That depends upon how it is applied.

Q. Explain it to the jury; you have better knowledge of that than I or the jury. You have had experience along that line.

A. Well, if you were to pull the emergency and didn't care if you tore up the train it would stop in a short distance.

Q. About how far would it run after you applied the air; or pulled the air, whatever you term it?

A. From 7 to 10 car lengths, if you didn't care if you tore up the train.

Q. If you didn't want to tear up the train, about how far would it have to run?

A. If the air was applied gradually, I would say that it would stop a train within 12 or 14 car lengths, or something like that.

Q. Then you think if the conductor had pulled the air when you told him to, this train you were on could have been stopped within a distance of 12 or 14 car lengths without doing violence to it?

A. Yes, sir; but it could have been stopped within 7 to 10 car lengths but it would have torn the train up.

Q. In that case you would have had to applied what you, term the emergency?

A. Yes, sir.

[fol. 48] Q. But if the air had been applied gradually, the train could have been stopped within 12 or 14 car lengths; is that correct?

A. Yes, sir.

Q. Was Simpson a good engineer?

Mr. Lamb: Object to the question.

Court: The objection will be sustained.

Mr. Pace: We will take up that later. I will take that up later on another phase of the case. I think that it will be legitimate to go into that to show the type of engineer he was. That is all now.

Cross-examination.

Mr. Lamb:

Q. Before leaving Pine Bluff, train orders were issued to you by the Train Dispatcher?

A. Yes, sir.

Q. Your train being an Extra, it wasn't governed by any schedule in the time table?

A. No, sir.

Q. An Extra train is designated by the number of the engine; is that correct?

A. Yes, sir.

Q. And the engine number is so shown in the order addressed to the engine to which it refers?

A. Yes, sir.

Q. In this case, order No. 132, which I hold in my hand [fol. 49] was addressed to Extra 775 South (look at that and see if I am not correct)?

A. Yes, sir; that is correct.

Q. An extra train has no number except the number of the engine; is that right?

A. Yes, sir.

Q. That is the way Extra trains are designated; by the enginer number?

A. Yes, sir.

Q. Trains designated in the time table have numbers; is that correct?

A. Yes, sir.

Q. And order No. 104 was properly addressed to engine 775; and engine 775 was properly designated in train order No. 104, was it not?

A. Yes, sir.

Q. Nothing wrong about it?

A. No, sir.

Q. It's properly designated in this train order No. 104 (handing witness order) isn't it?

A. Yes, sir.

Q. Engine 775 shows very plainly in that order does it not?

A. Yes, sir.

Q. That train order was issued at Pine Bluff; it was given to Extra 775 south before it left Pine Bluff; had you seen that order before the collision?

A. Yes, sir.

[fol. 50] Q. What is the number of that order?

A. Order No. 104.

Q. Train order number 104?

A. Yes, sir.

Q. Please read that order to the jury?

A. Train order No. 104 addressed to C. & E.

Q. Just a minute; C. & E. means Conductor and Engineer does it not?

A. Yes, sir.

Q. All right, go ahead.

A. Train order No. 104 to C. & E. Eng. 775, period. Engine 775;

Q. Just read that part that refers to your train.

A. "Eng. 775 run extra Pine Bluff Shops to Texarkana yards, has right over No. 18 Eng. unknown Pine Bluff Shops to cross over McNeil.

Q. It was right over No. 18 to what point?
A. To cross over switch at McNeil.
Q. And that is where you say you went into the siding?
A. Yes, sir.
Q. And that is what the order says to do?
A. Yes, sir.
Q. If it please the court, I want to introduce train order No. 104, which I have referred to.

Court: Let it be introduced.

(Said order No. 104 is here introduced, "original order" and for identification is marked Exhibit "B".)

[fol. 51] EXHIBIT "B"

Form 19. Form 3142

St. Louis Southwestern Railway Co.

St. Louis Southwestern Railway Co. of Texas

Train Order No. 104

C. S. E. Aug. 2nd, 1930,

To-Eng. 775. At: Pine Bluff Shops.

X —— ——, Opr. At ——, M.

Eng. 775 run Extra Pine Bluff Shops to Texarkana Yard has right over No. 28 Eng. 779 Pine Bluff ships to Saline right over No. 18 Eng. unknown Pine Bluff Shops to Crossover McNeil, First and Second 16 Engs. 750 and 579 wait at Kedrons until 410 Am Faith 419 Am Sorrells 427 Am for Extra 775 South.

W. W. C.

Conductor and Enginemen must each have a copy of this order.

Made, Complete, Time: 4:10 a. m. Frazer, Opr.

Mr. Lamb, continuing cross-examination:

Q. This cross over at McNeil is where the switch is, and where the trains leave the main line to get in on what is called the passing track to let other trains pass?
A. Yes, sir.

Q. Where is that cross over with reference to the point which your train leaves the main line?

A. Right where you head in. This is a switch that opens from the main line north and extends on south where you leave the passing track and go out onto the main line again.

[fol. 52] Q. Is it north of McNeil; the north switch; is that north of McNeil as you go into the yards from the north?

A. Yes, sir.

Q. And at the south end where you re-enter the main line, there is another switch?

A. Yes, sir.

Q. Now, there is another switch that will let you out from the siding onto the main line?

A. Yes, sir.

Q. Between those two switches, where is the cross over?

A. Somewhere near the middle of the track; middle ways between the two switches.

Q. Where did your train leave the main line?

A. At the cross over.

Q. You cleared the main line?

A. Yes, sir.

Q. You had at least run far enough down on the siding so your caboose would be in the clear?

A. Yes, sir.

Q. You did that, did you?

A. Yes, we got in the clear.

Q. You say that your train stopped; or did it stop?

A. Yes, we stopped to head in.

Q. You had to stop in order to throw the switch to let you get in on the passing track?

A. Yes, sir.

[fol. 53] Q. After you got in on the siding, did you stop at any place?

A. No, sir.

Q. Do you know who threw the switch to let you out onto the main line again?

A. Yes, sir.

Q. Who?

A. The head brakeman; McKinzie, he ran for the derail.

Q. Did you see him running along ahead of the train?

A. Yes, I saw him run and stoop over to throw the derail.

Q. That was to let you out on the main line again; it would let your train out onto the main line again?

A. Yes, sir.

Q. Out onto the main line at McNeil?

A. Yes, sir.

Q. After you left that switch; after you had paased that switch, was it necessary to do anything to it?

A. Yes, sir.

Q. What was necessary, and who did what was necessary?

A. I was told that a negro, he was a section laborer, I knew he worked around the yards there; I understood he was told to throw the switch.

Q. It was the duty of the man on ths caboose to see that the switch was properly thrown after you had passed it; is that correct?

A. Yes, unless you had a qualified man there for that purpose.

[fol. 54] Q. Was the switch properly thrown?

A. Yes, sir.

Q. You saw him throw it whoever it was?

A. Yes, sir.

Q. No trouble about that?

A. No, sir.

Q. While you were at McNeil, was there another order received by engine 775?

A. Yes, sir.

Q. What is the paper I now hand you? (handing witness paper).

A. That is train order No. 132.

Q. Please read it to the jury?

A. Train order No. 132, August 2nd, 1930, McNeil. "to Extra 775 south". Secon- 18 Eng. meet extra 775 South at Stamps.

Q. That order has the Dispatcher's signature on it?

A. Yes, his initials J. C. G.

Q. And the train order shows the time completed down there?

A. Yes, sir.

Q. What time does it show that it was complete?

A. 11:38 A. M.

Q. Did you see that train order at McNeil?
A. No, sir.

Mr. Pace, interrupting: What is the number of that order, Mr. Lamb, please?
Mr. Lamb: No. 132.

Mr. Lamb:

Q. Did you see that order handded up to the caboose?
[fol. 55] A. I saw some order handed up.
Q. But you didn't read it?
A. No, sir.
Q. To whom was it handed up?
A. To brakeman Dorman.
Q. Dorman was the rear brakeman?
A. Yes, sir.
Q. Is it proper and customary in the delivery of train orders to members of train crew by the Agent or Operator to hand them either to the conductor or brakeman on the caboose?
A. Yes, that is customary.
Q. It's frequently done, is it not?
A. Yes, sir.
Q. And what does the brakeman do with it then?
A. He hands it to the conductor.
Q. Do you know whether brakeman Dorman handed the order to conductor DeMaine? the order you saw handed up to Dorman?
A. They went out of my sight then.
Q. You don't know personally whether Dorman handed the *the* order to DeMaine or not?
A. No, sir.
Q. You couldn't swear that the order you have in your hand is the order that brakeman Dorman received and handed to Conductor DeMaine?
A. No, sir.
[fol. 56] Q. How are train orders delivered to the head of a train?
A. In the same manner.
Q. Who usually receives them?
A. The head brakeman or the fireman.
Q. The head brakeman usually rides on the engine?
A. Yes, sir.

Q. The head end is made up of the engineer, fireman and head brakeman?

A. Yes, sir.

Q. And the train orders are always handed up to the head brakeman or the fireman?

A. Yes, because the engineer is watching ahead.

Q. What are their duties to do with it when they receive it?

A. Hand it to the engineer.

Q. After the enginer receives it, what does he do with it?

A. He reads it.

Q. Is is the duty of the fireman also to read it?

A. Yes, sir.

Q. On the caboose, it is the duty of both brakemen to read the train orders?

A. Yes, after the Conductor reads them.

Q. When the orders are received by the brakeman on the caboose, does he read them before handing them to the conductor?

A. No, sir; he turns them over to the Conductor just as soon as he receives them.

[fol. 57] Q. But he should read them later?

A. Yes, sir.

Q. Does the Conductor and brakeman frequently read the orders together?

A. Do you mean look at them at the same time? No.

Q. When did you first see order No. 132?

A. The night of the investigation.

Q. That was a few days after the wreck?

A. Yes, sir.

Q. Order No. 132 was received at McNeil?

A. It proved out that way.

If it please the court, order No. 132, the original is somewhat mutilated, and I am going to introduce an exact copy of that order.

Court: It may be introduced.

EXHIBIT "C"

Form 19

St. Louis Southwestern Railway Co.

St. Louis Southwestern Railway Company of Texas

Train Order No. 132

Aug 2nd, 1930.

To Extra 775 South, at McNeil.
Second 18 Eng. 778 met Extra 775 south at Stamps.

J. C. G.

Conductor and engineman must each have a copy of this order.
Made, Complete, Time: 11:38 A.M. K.W., Opr.

[fol. 58] Mr. Lamb, continuing cross-examination:

Q. I believe you stated awhile ago that when the collision occurred Conductor Demaine was standing in the caboose with the orders in his hand; is that correct?

A. Yes, he had all of the train orders in his hand.

Q. You had broight them down from up in the cupola?

A. I did the ones we received out of Pine Bluff, but not the one at McNeil.

Q. Where was that order you received at McNeil?

A. He had that in his hand also.

Q. Then he had received that order?

A. I suppose he had, he had it in his hand.

Q. But you didn't deliver it to him?

A. No, sir; not the one that was received at McNeil.

Q. Where was it at the time you saw it. Where was the train at the time you saw Demaine standing with the orders in his hand; including train order No. 132?

A. I couldn't say about order No. 132, as I didn't see it. But the orders I got for him from the Cupola at that time we were moving southward.

Q. You don't know of any other order he received at McNeil?

A. I didn't know that he had received the order.

Q. But you knew that he had received a train order at McNeil?

A. Yes, sir.

Q. If that is the train order he received, then you saw that order in his hand?

A. Not that one.

[fol. 59] Q. I mean the original order?

A. I can't say.

Q. But if that is the order he received at McNeil, that is the order you saw in his hand?

A. He had a number of orders in his hand then; he had the bunch that I brought down out of the cupola. I noticed that he had a clearance card in his hand.

Q. I didn't understand you awhile ago about where the train was when Demaine was standing in the caboose reading his orders?

A. We were moving southward out of the passing track.

Q. You hadn't at that time got out of the passing track onto the main line. Entirely out?

A. No, sir.

Q. Demaine was examining the orders then?

A. Yes, sir.

Q. At what time?

A. When he had them in his hand.

Q. You mean after he had gotten the orders you handed to him from the cupola; these were the orders you received out of Pine Bluff.

A. Yes, on the line.

Q. How many orders did you hand him?

A. I don't remember, but there were several of them.

Q. Was he turning them and examining them one by one?

A. He appeared to be doing that.

Q. That was apparently what he was doing?

[fol. 60] A. Yes, sir.

Q. You had called his attention to train No. 18, or Second 18.

A. I didn't know anything about Second 18 at that time.

Q. You didn't know that Second 18 was on the road prior to that time?

Q. He said that he had a meet with Second 18 at McNeil.

A. Yes, sir.

Q. Having called his attention to train No. 18, you asked him what he had on it?

A. Yes, sir.

Q. Was he apparently looking for some order with reference to No. 18?

A. Yes, he seemed to be looking.

That is all.

Redirect examination.

Mr. Pace:

Q. Your train was coming from the north going south?

A. Yes, sir.

Q. You were above the depot headed southward going on the main line.

A. Yes, sir.

Q. You had crossed over and gone on over to the passing track, and the passing track was over on the east side of the main line, and the depot was on the west side, and the public highway crosses these tracks just below the depot; the highway that goes on to Magnolia?

[fol. 61] A. Yes, sir.

Q. How far is it from the depot to where the passing track leads out on to the main line?

A. I would say about 30 to 35 car lengths.

Q. Right along here now, (indicating on a plat that was drawn on the floor of the court room by attorneys for plaintiff) is there a curve right along here (indicating on the plat).

A. Yes, right along down there a little further.

Q. Right about here (indicating on plat)?

A. Yes sir.

Q. That curve leads out in this direction (indicating and pointing)?

A. Yes, sir.

Q. Of course I am not much of an artist on drawing maps. Now, if I understand you correctly, here is the south public road crossing (pointing on plat)?

A. Yes, sir. That is about where I got out of the caboose and come on down and spoke to Demaine.

Q. And this conversation took place between this public road crossing and right here (pointing on plat) and this switch on down here (pointing on plat)?

A. Yes, sir.

Q. And this point right here; this switch here (pointing on plat) is where the train entered the main line?

A. Yes, sir.

Q. And this train continued to move on after you had [fol. 62] gotten orders up from the cupola.

A. Yes, sir.

Q. And handed them to the conductor?

A. Yes, sir.

Q. The train continued on after you had told the conductor that if he didn't have anything on No. 18, he had better pull the air?

A. Yes, sir.

Q. And that is when the collision took place?

A. Yes, sir.

Q. Where were you when the collision occurred?

A. On down there a little further.

Q. About here (pointing).

A. No, a little more.

Q. About here (pointing on plat)?

A. Yes, sir.

Q. How far down the track would that be?

A. About a mile and a half.

Q. When the collision occurred?

A. Yes, sir.

Q. From the south switch or the depot?

A. About a mile and a half from the south switch.

Q. Now, you told the jury awhile ago that Dorman came in off of the back platform and spoke to the Conductor and told him to pull the air and read his orders later?

Mr. Lamb: If he did so testify once, we object to his repeating this evidence.

Mr. Pace: I am only doing this to locate the place where it occurred; not for the purpose of repeating the evidence; [fol. 63] I just want to get the location where the conversation took place.

Court: All right he may do that.

Mr. Pace:

Q. The conversation between Demaine and Dorman occurred here (pointing on plat)?

A. Yes, sir; after we had passed over the south switch.

Q. Some where along in here (pointing on plat)?

A. Yes, sir; a little further south.
Q. About here (pointing on plat)?
A. Yes, sir.

That is all.

No further questions.
Witness excused.

[fol. 64] L. A. DORMAN, after first having been duly sworn, testifies as follows:

Direct examination.

Mr. Pace:

Q. Please state your name to the jury?
A. L. A. Dorman.
Q. Where do you live?
A. At Pine Bluff.
Q. How long have you lived there?
A. I came there in 1912 and then I went to Jonesboro, and was up there about 6 years and then went back to Pine Bluff in 1918.
Q. Were you in the employ of the St. Louis Southwestern Railway Company on August 2nd, 1930?
A. Yes, sir.
Q. In what capacity, please?
A. Brakeman on an Extra south.
Q. What is called the rear brakeman?
A. Yes, sir.
Q. What Extra was that, please?
A. Extra 775 south.
Q. Can you state about what time you left Pine Bluff?
A. Yes, somewhere around 3:30 or 4 A.M.
Q. On the morning of August 2nd, 1930?
A. Yes, sir.
Q. State whether you have ever been a conductor?
A. Yes, sir.
[fol. 65] Q. About how long have you worked for different Railroad Companies?
A. Ever since 1898.
Q. And a part of that time you were a conductor?
A. Yes, sir.

Q. And also a brakeman.

A. Yes, and a switchman in the yards.

Q. If I am not correct I want you to correct me; as I understand it, when you are cut off as a conductor, then you go back to braking?

A. Yes, sir.

Q. When business gets dull they usually cut you off as Conductor, but when business picks up again then you go back as a conductor?

A. Yes, sir.

Q. You work according to your seniority?

A. Yes, sir.

Q. What position did you occupy on the day of this alleged accident near McNeil?

A. I was the rear brakeman on the Extra 775 south.

Q. What orders did you have out of Pine Bluff on your train?

A. We had several orders along the line.

Q. I mean what orders did you have out of Pine Bluff with reference to No. 18?

A. We had rights over No. 18 Pine Bluff Shops to cross-over at McNeil.

[fol. 66] Q. No. 18 was a freight train?

A. Yes, sir.

Q. Coming north?

A. Yes, sir.

Q. From Texarkana to Pine Bluff?

A. Yes, sir.

Q. Your train was running as an extra on train orders going south?

A. Yes, sir.

Q. You had the right over Number 18 to McNeil cross-over; that is the cross-over that passes from the main line to the passing track?

A. Yes, sir.

Q. When you arrived at McNeil, what did you do then?

A. We headed in on that cross-over.

Q. Who closed the switch at the cross-over?

A. I did.

Q. You was the rear brakeman, so you closed the switch?

A. Yes, sir.

Q. After your train had pulled in onto the passing track, then you closed the switch behind it?

A. Yes, sir.

Q. Was there another train at McNeil at the time?

A. Yes, the local was standing in front of the depot.

Q. On the main line?

A. Yes, sir.

Q. It was along here somewhere (pointing on plat)?

[fol. 67] A. Yes, sir.

Q. It didn't extend out so as to keep you from going in on the passing track?

A. No, sir.

Q. After you got to McNeil, what was done, if anything, what was said, if anything, and all about the occurrence there?

A. I remember that we got an order at McNeil. The conductor was standing in the door of the caboose. I was on the lower step. The train was moving along slowly and I thought it was going to stop and I had intended to cut the crossing there at the public highway crossing, so Key, the agent, was standing there with an order in his hoop and just before the caboose got to him he took the order out of his hoop and handed it to me and I caught it with my left hand. The caboose took a lunge like we were leaving. I shoved the order open and read it and then handed it to conductor Demaine.

Q. What did the order say?

A. It said "Second 18 Eng. 778 meet Extra 775 South at Stamps.

Q. All right, go ahead.

A. The caboose took another lunge. At that time the caboose was about that road crossing. Demaine was standing there in the door of the caboose, so he went on into the caboose, and when the caboose go- down about half way between the depot and the passing track switch De-

[fol. 68] maine came out of the caboose on the right hand side of the train and says "high ball the switch" high ball in railroad means to go ahead. Like we are not going to stop to eat at some restaurant on the line, we will say "highball that restaurant", meaning we won't stop and eat. By that time Demaine had gone back into the caboose, so I got over there to see that the negro properly threw the switch.

Q. When he told you to highball that switch, what did you say to him?

A. I asked him who was going to close the switch?

Q. What did he say?

A. I don't remember what he did call him, anyhow as I started to say, I got over to see if he closed the switch; it was some colored man. He has been there ever since I have been on the Cotton Belt. I think he is some kind of a watchman.

Q. What happened next?

A. I went on into the caboose and asked Demaine where we were going for No. 18?

Mr. Lamb: The evidence he is giving may be proper at this time, but I want to reserve the right to exclude it as I did of that with reference witness Craig.

The Court: All right.

Mr. Pace:

Q. Go ahead; you went into the caboose?

A. I went into the caboose and asked Conductor Demaine [fol. 69] where we were going for No. 18. He says, "Lets see what we got out of Pine Bluff on 18. I says to him "What did you get here on No. 18?" he says "All we got here was an order to meet Second No. 18 at Stamps. I says "Is that all you got here." He says "Yes." I says, "pull the air as you haven't got anything on No. 18 then," "stop this train". He says, "I will pull the air." He told me not to pull the air. Craig was standing there and he told Craig to get up there and hand him the orders; Craig did that and while he (Demaine) was looking at them, we hit. I says, "pull the air and then look at the orders". I started to pull the air but he told me not to.

Q. Demaine says not to pull the air but get the orders and see what he had on 18?

A. Yes, sir; he told Craig to hand him the orders.

Q. And while—after Craig handed him the orders, and he was reading them, the trains collided?

A. Yes, sir. He told me not to pull the air also.

Q. About how far out on the main line was you when you asked conductor Demaine about the orders, and when you told him to pull the air? And when you started to pull the air and he told you not to pull the air? How far were you from this switch?

A. 6-8 or 10 car lengths.

Q. That is when you had the conversation with him which you have just detailed to the jury?

A. Yes, sir.

[fol. 70] Q. You read that order when it was delivered to you; I mean when you handed it to the conductor?

A. Yes, glanced at it.

Q. Enough to know that it referred to Second 18?

A. Yes, sir.

Q. What caused you to ask him about First 18?

A. I knew that we only had rights over them to McNeil cross-over.

Q. Then you was given a meet with Second 18 at Stamps?

A. Yes, sir. I supposed there was another order to meet First 18 somewhere down the road.

Q. It is your duty to know where your train is going to meet another train, is it?

A. Yes, sir.

Q. The only order he got at McNeil was to meet Second 18 at Stamps, as you have just detailed to the jury?

A. Yes, sir.

Q. Did he ever pull the air?

A. No, sir.

Q. Instead of pulling the air, he started reading his orders, and that is when the collision occurred?

A. Yes, sir. We were standing up when we hit.

Q. Demaine, he was your conductor on the Extra 775 south?

A. Yes, sir.

Q. You were under him?

A. Yes, sir.

Q. According to the rules and regulations he had charge of the train?

[fol. 71] A. Yes, sir.

Q. He was your superior?

A. Yes, sir.

Q. State whether or not you had an occasion to pull the air on the same train between Pine Bluff and McNeil?

A. Yes, sir.

Q. What was the occasion for that?

A. On account of a derailment.

Q. What size train was this Extra 775 South?

A. You mean the number of cars?

Q. Yes, about how many cars did you have in this train?

A. 43 cars and the caboose.

Q. Some loaded and some empty?

A. Yes, about half and half.

Q. You said that you had an occasion to pull the air; did you pull the air from the rear of the train?

A. Yes, sir.

Q. Did it stop the train?

A. Yes, sir.

Q. The air worked properly, did it?

A. Yes, sir.

Q. That was on the way down to McNeil?

A. Yes, sir.

Q. You say that you had a derailment; do you mean that a car left the track?

A. Yes, sir.

Q. Who pulled the air?

[fol. 72] A. I did.

Q. Did your train come to a stop?

A. Yes, sir.

Q. You re-railed the car and then proceeded to McNeil?

A. Yes, sir. After quite a lot of trouble.

Q. You finally had to set the car out, didn't you?

A. Yes, the car had some ridges on the wheel and it wouldn't take the curves.

Q. State to the jury if conductor Demaine had pulled the air on that train when you spoke to him; state to the jury how far it would have run before it would have come to a stop?

A. That would be a hard question to answer.

Q. I don't mean exactly, but you can give the jury some idea; you are experienced along that line, better than I, or the jury.

A. I would say around 15 car lengths.

Q. And you started to pull the air and the conductor stopped you?

A. Yes, sir.

Q. At the time your train collided; how did it come to a stop; were the brakes applied on the train at the place where the collision occurred?

A. They must have been as the caboose stopped real easy.

I believe that is all for the present.

Cross-examination.

Mr. Lamb:

Q. I believe that you stated that you saw order No. 104 [fol. 73] which has been introduced in evidence; we are using a copy of order No. 104 for convenience because its plainre; you saw that order, did you not?

A. Yes, sir.

Q. That order was given to your train before leaving Pine Bluff?

A. Yes, sir.

Q. That is the order which you say gave you rights over No. 18 Pine Bluff Cross-over at McNeil?

A. Yes, sir.

Q. This order doesn't give you rights over No. 18 any further than the cross-over at McNeil, does it?

A. No, sir.

Q. It doesn't give you rights over No. 18 south of McNeil, does it?

A. No, sir.

Q. Nor did train order No. 132 you received at McNeil give you rights over No. 18 south of McNeil?

A. No, sir.

Q. You had no train order of any kind giving you rights over No. 18 south of McNeil?

A. No, sir; not that I knew anything about.

Q. You spoke of train 18 once as First 18; I presume you did that to distinguish it from Second 18?

A. Yes, sir.

Q. But train 18 would be the proper way to refer to it in designating it in the train order?

[fol. 74] A. Yes, sir.

Q. Of course, if you had Second 18, Third 18, and Fourth 18, you would refer to them according to number and the number of trains that were running?

A. Yes, sir.

Q. Train order No. 104 is addressed to Engine 775; C. E. Eengine 775; C. E. Means Conductor and Engineer, doesn't it?

A. Yes, sir.

Q. You say that train order No. 132 was handed up to you on the rear of your train; the rear end?

A. Yes, sir.

Q. Did you read it before you handed it to Demaine?

A. I shoved it open and saw the body of the order; I only saw the body of it.

Q. Do you know what the order was?

A. Yes, sir.

Q. The observation that you made of the order, you knew that it was duly issued train order directing your train to meet Second No. 18 at Stamps?

A. Yes, sir.

Q. When you handed the order to Demaine what did he do with it?

A. He took it and went in the caboose.

Q. Did you see him when he read it?

A. No, sir.

Q. Did any one else read it besides, you, including Con-
[fol. 75] ductor Demaine?

A. Not that I know of.

Q. Where was brakeman Craig at that particular time?

A. He was in the caboose somewhere.

Q. Did you see him read it?

A. No, sir.

Q. It's the duty of all trainmen to read the orders that they receive, isn't it?

A. Yes, sir.

Q. What was it that the colored fellow did?

A. He lined up the switch behind the caboose and the de-rail.

Q. You saw him do that, did you?

A. Yes, sir.

Q. When you saw him do that, that relieved you from your responsibility at the moment?

A. Yes, sir.

Q. It was properly done, was it?

A. Yes, sir; as far as I know.

Q. Whether it was properly or improperly done, it didn't have anything to do with the wreck, did it?

A. No, sir.

Q. You say that you started to pull the air; do you mean that you went in the direction of the appliance and without taking hold of it?

A. We were inside the caboose; I had gotten up in where you come outside, just inside the door. The door was open and I made a step toward the appliance.

[fol. 76] Q. By which you could apply it?

A. Yes, sir.

Q. But you didn't begin the operation of the appliance?

A. No, sir.

Q. But you think that the brakes were applied just before the collision on account of the caboose stopping so easily?

A. The brakes were either applied or some empty flat cars broke in two; I know the caboose stopped real easy.

Q. In the delivery of train orders; we will take the rear end of the train first: The operator or some one at the station; some authorized agent of the Company receives the orders and then delivers them to the trains to which they are addressed?

A. Yes, sir.

Q. To whom do they deliver the orders at the rear end of the train?

A. To anybody that is out.

Q. Either the conductor, the swing brakeman or the rear brakeman?

A. Yes, if the swing brakeman happens to be riding in the caboose.

Q. If he was up some place on the train then the conductor or rear brakeman receives the orders?

A. Yes, sir.

Q. Now, the board, what is that called? Semaphore?

A. Yes, we usually call it the train order board.

Q. And the position of that train board at McNeil indi-
[fol. 77] cated that orders were to be received, and in fact an order was received at McNeil?

A. Yes, sir.

Q. If a brakeman receives an order, what is his duty to do with it?

A. He can read it if he wants to, or he can hand it to the conductor to read.

Q. What does the conductor do after he reads the order with reference to the brakeman?

A. He hands it to the brakeman.

Q. So that the brakeman will know what the orders are?

A. Yes, sir.

Q. Now, when train orders are to be delivered to the head end of a train, who receives the orders?

A. The head brakeman or the fireman.

Q. The engineer doesn't receive them?

A. No, the engineer is always busy and he very seldom gets down out of his position to get an order; if he gets down to receive an order, he has to leave his throttle. That is why the head brakeman or the fireman receives them.

Q. Either the brakeman or the fireman can receive the orders, but it is their duty to hand them to the engineer immediately.

A. Yes, sir.

Q. If the brakeman receives them, he hands them to the engineer?

A. Yes, sir.

[fol. 78] Q. If the fireman receives them, he hands them to the engineer?

A. Yes, sir.

Q. But it is the duty of the fireman and brakeman to know the contents of the orders that are received and delivered to the engineer?

A. Yes, the engineer hands them back to the fireman and brakeman so they can read them.

Q. Do you know personally, anything about the delivery of train order 132 to the engineer at the front end of Extra 775 South the day of the collision?

A. No, nothing whatsoever.

Q. You didn't see him receive that order to your own personal knowledge?

A. No, sir.

Q. How many people got killed in that collision?

A. 5 trainmen and two negro tramps.

Q. How many got killed; or how many of your crew got killed?

A. 3.

Q. Who, which ones?

A. The engineer, fireman and head brakeman.

Q. And the members of the crew on No. 18?

A. The engineer and the fireman.

Q. The head brakeman on train 18 got his arm broken and shoulder dislocated, but he didn't get killed?

A. No, sir.

[fol. 79] Q. At the time of the collision, what was Conductor Demaine doing?

A. Looking at these orders in the caboose.

Q. They had been delivered to him?

A. Yes, sir.

Q. That is when the inquiry arose with reference to No. 18?

A. Yes, sir.

Q. Do you know how many orders he had in his hands at that particular time?

A. No, but he had several; they are kept on a clip Board. He had this one order in his hand that we got at McNeil, and he was turning these other orders over looking at them.

Q. You mean train order 132; is that the order he had in his hand?

A. Yes, sir.

Q. And he was turning the other orders over one by one looking at them?

A. Yes, sir.

Q. That is when you asked him if he had anything on 18?

A. Yes, sir.

Q. What is this book I hand you (handing witness book)?

A. That is a book of rules.

Q. Does that book of rules govern the movement of freight trains, also passenger trains?

A. Yes, that is a general rule book.

[fol. 80] Q. That book of rules was in force last August 2nd., was it not?

A. Yes, sir.

Mr. Pace: We will agree that the rule book was in force last August the 2nd. 1930.

Mr. Lamb: If it please the court, I would like to identify this rule book. It won't be necessary to introduce the whole book, as we just want to refer to certain parts of it?

Court: All right. (Book is identified as exhibit "D".)

Redirect examination.

Mr. Pace:

Q. How fast was your train going that day?

A. About 15 to 18 miles per hour.

Q. As it was coming out on the main line?

A. Yes, sir.

Q. Was it increasing speed as it moved along?

A. Yes, because its down hill there.

Q. There is a little valley that starts up along in here (pointing on plat)?

A. Yes, sir.

Q. It starts in about here (pointing on plat) and comes on down here, and here is where the hill starts sloping downwards?

A. Yes, sir; but you have got the curve turned wrong,

Q. Where, down here (pointing on plat)?

[fol. 81] A. Yes, sir; right on down a little farther, it should turn to the left.

Q. About here?

A. Yes, sir.

Q. Oh, yes; it goes out this way (indicating)?

A. Yes, sir.

Q. About like that (indicating)?

A. Yes, sir.

Q. In what condition was this equipment on the Extra 775 South that day?

A. In good condition.

Q. The train was properly equipped?

A. Yes, sir.

Q. Let me ask you; why did you start to pull the air, because you didn't think he had anything on No. 18?

A. Yes, sir.

Q. If he didn't have anything on No. 18; what did that mean?

A. It meant that we were going to meet them somewhere on the main line.

Q. It was a dangerous situation and that is why you wanted to pull the air?

A. Yes, sir.

Mr. Lamb:

Q. You didn't know where 18 was at the time, did you?

A. No, sir.

Q. It was your duty to remain at McNeil until No. 18 [fol. 82] arrived and cleared, or until you got further orders to proceed against number 18?

A. I thought at the time, we had orders to go.

Q. I know, but you hadn't seen any orders or orders to that effect, had you?

A. No, sir.

Q. The fact that the engineer was moving on out, you presumed that he had received authority to proceed?

A. Yes, but it showed up that he didn't have.

Q. Your train had no authority, neither did Simpson have any authority to run his train out of McNeil as against No. 18?

A. No, sir.

Q. You didn't know where No. 18 was, but you knew that it was the duty of engineer Simpson to remain at McNeil in the clear of train No. 18 until it had arrived and cleared, or your train received further orders to proceed as against No. 18, and no such order or orders were received?

A. No, sir.

That is all.

Witness excused.

[fol. 83] GEO. J. SCREETON, after first having been duly sworn, testifies as follows:

Direct examination.

Mr. Pace:

Q. Please state your name to the jury?

A. George J. Screeton.

Q. Where do you live?

A. At Hazen.

Q. What official position do you occupy in Prairie County?

A. I am county judge.

Q. How long have you lived in this county, Judge?

A. About 50 years.

Q. State whether or not, a short time ago you went down to McNeil and made an examination of the place where this accident occurred, which is now on trial?

A. Yes, sir.

Q. Do you remember the date that you went down there?

A. Yes, it was on the 20th day of February.

Q. Mr. Wilkins and myself went with you?

A. Yes, sir.

Q. State whether or not you began here at the depot; this is the depot right here on the roughly drawn plat I have made here. This is the depot right here (pointing on plat) here is this passing track running along here (point-
[fol. 84] ing on plat), and here is the south switch on down here (pointing on plat) and on down here (pointing on plat) is the place of the derailment; or where it occurred; Now just go ahead and tell the jury the measurements you made, how you made them and all about it?

A. We started at the south switch and measured the rail with a steel tape, then we counted the rails to get the distance from the switch; the south switch down to where the accident occurred.

Q. How many feet was it?

A. 5641 feet.

Q. There are 5280 feet in a mile?

A. Yes, sir.

Q. And this distance was 5641 feet?

A. Yes, sir.

Q. From the south switch here (pointing on plat) to where the accident occurred?

A. Yes, sir.

Q. You walked from the switch down to where the accident occurred and walked back from the scene of the accident to the south switch?

A. Yes, sir.

Q. Is there anything to keep a person from seeing anything on the track between the point of the accident and the south switch?

A. No, sir. At the time we were making these measurement-, a freight train happened to be coming from the south going north and we stood there until it went in on the passing track.

[fol. 85] Q. The train was coming from the south going north?

A. Yes, we were looking at it at the time right where the accident occurred we quit counting the rails right there.

Q. And the distance from the south switch on down to the point of the accident was 5641 feet?

A. Yes, sir.

Q. A mile and between 300 and 400 feet distance.

A. Yes, sir.

Q. Do you remember about how many cars this freight train had?

A. Between 43 and 44 cars.

Q. The freight train passed you coming from the south going north while you were standing there at the point of the accident and you stood there and watched it come on down to the switch?

A. Yes, we could see the caboose clear on up to the switch. The caboose went in on the switch there.

Q. There was nothing to obstruct your view on down there where the passing track goes out on to the main line?

A. No, sir.

Q. State whether or not this train that had just passed was standing down here at the depot when we came on down there?

A. Yes, sir.

Q. State whether or not you and Mr. Wilkins measured the first 10 or 12 cars in that train in order to get the length of the cars?

[fol. 86] A. Yes, we measured the caboose, some oil tank cars just as we came to them from the caboose on up toward the engine?

Q. What was the average length of the cars that you measured?

A. 39 feet to a car.

Q. And you just took them as you came to them?

A. Yes. I believe we took the measurement of the caboose, 3 oil tank cars and the rest were box cars.

Q. And there was 43 cars in that train?

A. Yes, 43 or 44.

Q. The proof shows that the train that Simpson was on, the day he got killed, had 43 cars and the caboose; how long would that train be if you figured the cars at 40 feet each in length?

A. 1760 feet long.

Q. Then if the caboose was here at this point (pointing on plat) the train would extend out here 1760 feet?

A. Yes, sir.

Q. The engine of his train would be along in here somewhere?

A. Yes, sir.

Q. If the train could have been stopped within 15 car lengths as the caboose went out at this south switch here (pointing on plat) how far would it extend on down here?

A. About 600 feet further.

[fol. 87] Q. That would make 2360 feet from this south switch to where the train could have been stopped; that would make the train extend on down here at this point (pointing on plat) 2360 feet had the air been applied as the caboose pulled out at this south switch onto the main line?

A. Yes, sir.

Q. The engineer on the train coming south could see that train if the train had been stopped down here on the main line; the distance would be 3281 feet from where the engine of the south train came in view to where this train would have stopped, had the air been applied?

A. Yes, sir.

Q. The view was clear from this point here (Pointing on plat) at place of accident down here 3281 feet further and one could see a train stopped here at this point (pointing on plat) standing on the main line?

A. Yes, sir.

Q. That distance would be more than a half a mile?

A. Yes, sir.

Q. The engineer on the train coming from the south would be more than a half of a mile away from this train stopped on the main line at this point here after he came in view of it?

A. Yes, sir.

Q. How long did you say a train was with 44 cars attached to it?

A. 1760 feet measuring 40 feet to each car.

[fol. 88] Q. Now add 600 feet to that to stop a train in?

A. That makes a total of 2360 feet.

Q. That would leave a space of 3281 feet between the two trains after they came in sight of each other, or where the train coming from the south going north would come in sight of this train standing on the main line up here?

A. Yes, sir.

Q. And you say that there is nothing to obstruct a man's view from this point, here on this point here?

A. No, sir.

Q. Did you measure the number of feet from this switch back up to the road crossing, the public road crossing?

A. Yes, sir.

Q. How far was it, please?

A. 50 rail lengths. Figuring 33 feet to a rail totals 1650 feet.

Q. From this switch here back up to the public road crossing?

A. Yes, sir.

That is all.

Mr. Lamb: No cross-examination.

Witness excused.

[fol. 89] Mr. Pace: Call Mr. Wilkins.

Mr. Lamb: If this is the same one that was with Mr. Screeton at the time he took these measurements, to help things along, we will admit that his testimony be the same as that of the witness who just testified.

Court: Is his testimony cumulative, Mr. Pace?

Mr. Pace: Yes, it will be practically along the same line, Your Honor, but we would like to ask this witness a few questions. It won't take over two minutes.

Court: All right.

Mr. Pace: Take the stand Mr. Wilkins.

C. W. WILKINS, after having been first duly sworn, testifies as follows:

Direct examination.

Mr. Pace:

Q. You went with Judge Screeton down to McNeil on February 20th, the day some measurements were taken?

A. Yes, sir.

Q. For the purpose of looking over the place where the wreck occurred?

A. Yes, sir.

Q. He testified that gave you a distance of 5641 feet, between the south switch and the place of the accident?

A. I think those were the figures arrived at.

Q. He also testified that there was nothing to obstruct the view between the point of the accident and the switch up here; is that correct?

[fol. 90] A. Yes, sir.

Q. He also testified that you and he measured some box cars that were attached to a freight train belonging to this same railroad?

A. That is correct. I think we measured 11 cars.

Q. He testified that the length of each car was a little over 39 feet?

A. Yes, that is correct.

Q. He also testified that he figured out the length of this train and it was 1760 feet in l-ngth figuring 44 cars to the train including the caboose?

A. Yes, sir.

Q. He also figured the 600 feet to stop the train and the 1760 feet the length of the train totals 2360; he also testified that the distance from the switch to the point of the accident was 5641 feet; he also testified after subtracting the distance of 600 feet in which the train could stop and the length of the train which was 1760 feet left a distance of 2381 feet or a little more than a half of a mile between the point of the accident and where the train could have stopped had the brakes been applied by the conductor.

A. Yes, sir.

Q. That was a little more than a half of a mile open view from the point of the accident on up here to where this train would be standing had the air been applied as the caboose left the switch going onto the main line. Was [fol. 91] there anything to obstruct a person's view between these two points?

A. No, sir.

Q. A train coming from the south going north coming around at this point here (pointing on plat) could easily see a train standing up here at this point?

A. Yes, sir.

That is all.

Cross-examination.

Mr. Lamb:

Q. Explain a little more thoroughly about the points of view. There is a slight curve right up here (pointing on plat)?

A. Yes, sir.

Q. Do you mean that you could see from this switch on down here around this slight curve a distance of 5641 feet?

A. Yes, we could see from the point of the accident on up here because the day we were down there, a freight train happened to come along and it wwnt in on the siding and we could see the caboose as it passed over this switch up here.

Q. You could readily see on a line from this point down here where the collision occurred on up here to this switch?

A. Yes, sir.

Q. What direction was this train coming from?

[fol. 92] A. From the south going on north.

Q. You could see a distance of 5641 feet on up north?

A. Yes, sir.

That is all.

Witness excused.

[fol. 93] Tom Black, after having been first duly sworn, testifies as follows:

Direct examination.

Mr. Pace:

Q. Where do you live? First, state your name to the jury?

A. Tom Black.

Q. Where do you live?

A. McNeil.

Q. What is your occupation, please sir?

A. Farmer.

Q. How long have you lived at McNeil or in its vicinity?

A. About 25 years.

Q. Do you own your own farm?

A. Yes, sir.

Q. State whether or not you were living down there August 2nd, 1930?

A. Yes, sir.

Q. Do you recall the occasion when the wreck occurred down there on August 2nd, in which engineer Simpson was injured and later died?

A. Yes, sir.

Q. About how far do or did you live from the point of the wreck?

A. Between one and one half and two miles.

Q. State whether or not you went over there to the scene of the wreck?

A. Yes, sir; I went over there.

Q. How near did you go; just go ahead and tell the jury [fol. 94] what you did, if anything, what happened and what connection you had with anything that occurred there after it happened?

A. I was up in town when it happened, so my brother-in-law and I rushed out there and we met some of them coming into McNeil; they had already taken some of the men out of the wreck; we drove up close to the wreck and they had Mr. Simpson on a cot. The ambulance was out there waiting on the outside of the fence, so me and some other men started to the ambulance with him, and I got hold of the cot at the foot and we got him to the fence and we had to lift the cot over the railroad fence. We got him in the ambulance and started for McNeil. By that time a number of cars had driven up. We started to McNeil and I sorter put him head and breast up against my shoulders; he was a very heavy man; there was another gentleman at the head of the cot, so we went on into McNeil, it was about a mile and a half to town, so this man, on the way to town started telling how he was——

Mr. Lamb: Int-rrupting:

Q. Do you mean the injured man, Mr. Simpson?

A. Yes, sir.

We object to what was said by Simpson at that time.

Mr. Pace: We have a right to show the condition he was in, the pain and suffering, and whether or not he talked in a rational way; we always have a right to prove the mental suffering and the explanation made by the party to show the frame of mind he was in until his death; that is the only way to get at it. I never had an objection raised like that before.

Court: That is true, but couldn't the witness state whether or not he complained without stating what he said?

[fol. 95] Mr. Pace: In order for the jury to get the facts, we would have to prove what the deceased said, otherwise

this witness would have to draw his own conclusions about it. We have a right to go further and show the state of mind he was in on up to his death.

Court: There ought to be a limit to it somewhere. If you want to show the man's condition for the purpose of showing whether of not he was conscious, unconscious or whether or not he suffered pain before his death, that is always admissible. I think you can show that by any layman.

Mr. Lamb: We have no objection to this witness stating whether or not Simpson appeared to be conscious and whether or not there was an exclamation of pain and suffering; we have no objection to it. But if he is undertaking to establish liability of this railroad by a statement made by Simpson at that stage after this witness had traveled a mile and a half to get to the wreck, and then they were on their way back to McNeil, we object to it.

Mr. Pace: I think I understand your objection now, Mr. Lamb; you would be right if we were establishing liability by a statement made by the deceased, but we are not referring to any liability; we are going to talk about his pain and suffering he endured before he died; the explanation he made and the state of mind he was in. You would be right on the theory that you refer to.

Mr. Lamb: We have no objection to the witness stating whether or not the man was conscious or apparently so, and whether or not he suffered any pain from the explanation he made, but as to what he said, we do object to it.

Mr. Pace: That's not the rule.

Court: I think it would be competent to show by the witness whether or not he was conscious or unconscious, also his physical condition.

I will permit the witness to state what he said with reference to the wreck or how it occurred.

[fol. 96] Mr. Lamb: Note our exceptions to the ruling of the court.

Mr. Pace, continuing direct examination:

Q. Go ahead and tell what he said and whether or not he said that he was suffering pain while you were going to the wreck to McNeil?

A. You were talking about with reference to pain and suffering, are you?

Q. Yes, sir.

A. He was suffering all a man could suffer. He said that he was suffering. When we got about half way to town he began getting sick and went to vomiting. I was holding him with his face up in my arms; I told him that we would be to town in a minute, then he started begging for water, and when we got to town I got him a drink of water the first thing.

Q. What did he say with reference to his family?

Mr. Lamb: Question objected to. It is not competent to prove the language used, but the witness may tell the subject about which the deceased talked.

Court: Come up here, Mr. Pace, I don't know what you are trying to prove. The jury will be excused a minute.

Mr. Pace: We want to show that on the way to McNeil in the ambulance, the deceased called for his wife and daughters, and that he said that if he could just see them before he died it wouldn't be so hard; he also stated that he knew that he was going to die.

Court: He may answer that question.

Mr. Lamb: We except to the ruling of the court.

[fol. 97] Mr. Pace, continuing:

Q. What did he say with reference to his family while you were on your way to town in the ambulance?

A. You fellows have got me crossed up no; do you want me to leave off about the wreck?

Q. Yes, sir.

A. He says. "I am going to die; if I could only see my wife and daughters, it wouldn't seem so hard." I says to him, "sometimes we get over these things"; he says, "not for me though, I am going to die." This was before he started to vomiting; he didn't talk much more because he got sick at the stomach.

That is all.

Mr. Lamb: We object to all questions and answers with reference to the conversation about his family and about his pain and suffering; and move the court to exclude it.

Court: Overruled.

Mr. Lamb: Note our exceptions.

No Questions.

Witness excused.

[fol. 98] E. S. BURNS, after first having been duly sworn, testifies as follow:

Direct examination.

Mr. Pace:

Q. Please state your name to the jury?
A. E. S. Burns.
Q. Where do you live, Mr. Burns?
A. At McNeil.
Q. What is your business?
A. I am Superintendent of the McNeil Public Schools.
Q. State whether or not you were over there at McNeil on August 2nd. 1930?
A. Yes, sir.
Q. State whether or not you saw engineer Simpson after they had brought him from the wreck to the Hotel, and while there, I mean, and before they took him to the Hospital at Camden?
A. Yes, sir.
Q. Did you see him at the Hotel at McNeil?
A. Yes, sir.
Q. Was there any one else present?
A. Yes, I believe Dr. Souder and the boy that works at the drug store; we went over to the hotel to see if we could be of any assistance in taking care of any of the men they brought in.
Q. Is Dr. Souder a Doctor at McNeil?
A. Yes, sir.
[fol. 99] Q. What did they do with Mr. Simpson when they brought him over to the Hotel?
A. They took him out of the ambulance and took him inside a room.
Q. State whether or not you people undressed him while you were there?
A. Yes, the first thing we did was to wash his face, he was black, and his face was covered with cinders. His clothes were all wet, so we took off his overalls, his jumper and shoes.
Q. State whether or not while you were doing this, he complained of any pain or anything?
A. Yes, he complained of his back hurting him when we

moved him to remove his clothing; also complained of his head and other wounds, that we could not see.

Q. State whether or not he said anything about dying while you were there?

Mr. Lamb: We object; our objection will be the same as to the other witness.

Court: Overruled.

Note our exceptions.

Mr. Pace, continuing:

Q. Go ahead and answer the question?

A. He said that he was going to die, and said that he wouldn't be here long.

Q. He seemed to be impressed with the thought that he was going to die?

[fol. 100], A. Yes, sir.

Q. Did he say anything about his family?

A. Yes, he urged us to get his wife and daughters there as quickly as we could. He said that he wanted to see them once again, that it was an awful thing to die; get my wife and daughters here.

Q. State whether or not he said anything about his wife's picture?

Mr. Lamb: Question objected to. The same reason.

Court: Overruled.

Note our exceptions.

Q. What did he say about his wife's picture?

A. He told us that his wife's picture was in his purse and asked us to get it out; that he wanted to see it once again; we got the picture out after he kept calling for it, at first we didn't get the picture because we wanted to quiet him as much as possible; but we got the picture but never did show it to him.

Q. What else did you take out of his clothing?

A. His watch and his purse. I don't recall that we took out anything else.

Q. State whether or not you knew who he was?

A. Not until we asked him who he was and he said that he lived at Pine Bluff; we knew that he was on one of the two trains that figured in the collision.

Q. *He* state whether or not he said or inquired about his fireman?

[fol. 101] A. Yes, he asked what happened to his fireman. He wanted to know if he was killed in the wreck.

Q. Did you assist in taking him to the train when he was taken to the Hospital at Camden?

A. Yes, sir.

Q. Did you help put him on the train?

A. Yes, sir.

Q. Did you go to Camden with him?

A. No, sir.

Q. Do you know whether he lived until he got to Camden?

A. Nothing, only what I saw in the paper.

Q. Are you related to Mr. Condray, the Prosecuting Attorney of this District?

A. Nothing more than his wife and my wife are half sisters.

That is all.

Cross-examination.

Mr. Lamb:

Q. You say that you removed his overalls, jumper and his shoes?

A. Yes, sir.

Q. Where was his watch?

A. I don't remember, I think it was in his jumper pocket. It might have been in his shirt p-cket.

Q. You are not certain which?

A. No, sir.

Q. You say that he inquired of Mrs. Simpson's picture?

[fol. 102] A. Yes, sir.

Q. Who got out the purse; he said that his wife's picture was in his purse.

A. Yes, sir.

Q. Who got out the purse?

A. I did.

Q. You got it out, but you never showed it to him?

A. No, we tried to keep him as quiet as we could.

Q. You didn't show it to him and he never inquired about it any more?

A. He asked about it several times.

Q. And you say that he inquired about his fireman also?
A. Yes, sir.
Q. Did he inquire about anybody else?
A. I don't remember that he did.

No further questions.
Witness excused.

[fol. 103] A. R. McLain, after first having been duly sworn, testifies as follows:

Direct examination.

Mr. Pace:

Q. You may state your name to the jury?
A. A. R. McLain.
Q. Where do you live?
A. Little Rock.
Q. State whether or not you have experience as a Locomotive Engineer?
A. I have.
Q. On what Railroads, please sir?
A. I was made on the Wabash railroad; I worked for them 4 years. From the Wabash railroad, I went to the Denver and Rio Grande. I went from this line to the Chicago Peoria and St. Louis Railway; in 1909 I went to work for the Missouri & North Arkansas. I ran a locomotive on that road for 12 years. Then I worked for the Frisco 2 years.
Q. State whether or not during your experience as an engineer you operated freight trains?
A. Yes, also passenger trains.
Q. Then you are familiar with the operation of both, freight and passenger trains?
A. Yes, sir.
Q. With starting and stopping them?
A. Yes, sir.
[fol. 104] Q. State whether or not you went down to the place of this accident in which engineer Simpson lost his life at McNeil on August 2nd, 1930?
A. Yes, sir.
Q. When were you down there, please?

A. February 20th.
Q. 1931?
A. Yes, sir.
Q. February 20th, last month?
A. Yes, sir.
Q. Did you go to the place where the accident occurred?
A. Yes, sir.
Q. Did you see the track there?
A. Yes, sir.
Q. State whether or not if you take a train that was running between 20 and 25 miles an hour with the equipment in good working order and a train of 44 cars partially loaded and partially unloaded, or empty cars; some loads and some empties, I don't know the proportion; in what distance could you stop a train of this character at that particular place?
A. From 500 to 600 feet at the out-side.
Q. One could stop a train within the distance you say at that particular point as I have described?
A. Yes, sir.

[fol. 105] Mr. Lamb: I don't know what the purpose is to offer that evidence; if it's for the purpose to show that the train crew on No. 18 could have seen Extra 775 South in time to have stopped and avoided the collision, I want to object to it, because it wouldn't tend to support or sustain any issue in this law suit. If it's his purpose to show any negligence on the part of any member of the train crew on train No. 18, I want to object to it for the reason such evidence does not tend to support or sustain any issues in this law suit.

Mr. Pace: That is not the purpose for the introduction of this evidence, if it please the court. There is nothing in the complaint with reference to that, but I want to show by this witness in what distance one could stop this train there at the point where he could see down the track.

Mr. Lamb: There are no allegations with reference to that, the evidence is not competent for the reason that without regard to anything that conductor Demaine could have done or could not have done, or did do, or didn't do, and that testimony hasn't any right to be in this record for the reason that there isn't or wasn't any negligence on the part of any one except engineer Simpson, and his negligence

alone was the sole and approximate cause of his injury and death, and under the Act of Congress, he can't——

Mr. Pace: We can settle that on the instructions.

Court: I think I know what Mr. Pace is getting at; I will let him introduce that testimony, and if he doesn't connect it up, I will exclude it from the consideration of the jury.

Mr. Lamb: Note our exceptions to the ruling of the Court.

Mr. Pace, continuing direct examination:

Q. Now, Mr. McLain, then if you were up here at this point (pointing on plat) here where the accident occurred; it has already been testified that it was more than a mile from the switch down to the point of the accident; I suppose you remember that?

A. Yes, sir.

[fol. 106] Q. Now, what I am talking about, as a practical Engineer, with the experience you have had, take a train similar to the one that I have described here. An engineer coming around here with his train, he could see down to the switch up here?

A. I could see the switch plainly before I got to this point here?

Q. You mean this point here?

A. Yes, sir. I came up out of that hill, or that cut back down there (pointing on plat) about a hundred feet.

Q. You came out of this cut down here (pointing on plat) on up around this way?

A. Yes, sir.

Q. And you say that you had a clear view from here (pointing on plat) on down to the switch?

A. Yes, more than a mile.

Q. More than a mile?

A. Yes, sir.

Q. Then he could stop his train here at this point (pointin- on plat) had he applied his brakes; I am talking about the train coming from the south going north coming out of that cut and on the curve; he could easily stop from 500 to 600 feet; now, am I correct Mr. McLain?

A. Yes, sir.

Q. In operating a train, I suppose it can be stopped safer from the appliance at the Engine than it can be from the rear?

[fol. 107] A. Yes, sir.

Q. And you say that a train going at the rate of from 20 to 25 miles per hour with the equipment in good shape a train having 44 cars, partially loaded and partially empty could stop within 500 or 600 feet?

A. Yes, sir.

That is all.

Cross-examination.

Mr. Lamb:

Q. After you reached this point here (pointing on plat) Extra 775 could be seen on the main line?

A. Yes, you could see the Extra at the switch easily.

Q. Do you know the length of train 18?

A. I understood that it had 44 cars.

Q. How did you get that information, there is no record of it in this case.

No answer.

Q. The distance that 18 could be stopped in wouldn't depend upon the number of cars in Extra 775 south, would it?

A. I spoke of 18.

Q. Do you know how many cars 18 had in it?

A. I am not sure, no, sir.

Q. No proof here how many cars in that train?

No answer.

Mr. Pace: I didn't ask him about the number of cars No. 18, I asked him "a train of 44 cars not No. 18, having 44 cars.

Mr. Lamb:

[fol. 108] Q. The length of a train would have something to do with the distance in which it could be stopped?

A. Yes, sir.

Q. The fact that No. 18 had 44 cars wouldn't have anything to do with Engineer Simpson pulling his train out on the main line in the face of it when he had no right out there, would it?

A. I don't guess it would have.

We will admit that train No. 18 had 44 cars, but we object to the comoetency of this testimony.

Court: Overruled.

Save our exceptions.

Mr. Pace: The proof in this case shows that Mr. Simpson was 56 years old at the time of his death. The American Experience table of mortality gives his expectancy at 16 and 7/100 years.

Mr. Adams: We will agree that that is correct.

Mr. Pace: The Plaintiff rests.

Mr. Lamb: Now, if it please the court, I would like to make some objections.

Court: All right.

DEFENDANT'S MOTION TO EXCLUDE EVIDENCE, ETC.

Mr. Lamb: The defendant now moves, at the close of plaintiff's testimony, to exclude the evidence of witnesses Craig and Dorman, in so far as that evidence relates to the conversation between themselves and between them or either of them and Conductor Demaine, for the reason that eithout regard to any act or omission or commission or anything else that Demaine did or failed to do, did not contribute to the injury and death of Simpson, but that Simpson's conduct was the sole and approximate cause of [fol. 109] his injury and death by his violation of train orders which he held, and the proof so discloses. Further, that any evidence on the part of Craig or Dorman, with reference to what he said with reference to the application of the air from the rear, for the same reason as stated above. And we move to exclude all the evidence in this case with reference to the language, Simpson to them, and the distance required to stop a train, and the testimony with reference to the distance south of the switch from which a train could have been seen, testified by witnesses McLain and Screeton and Wilkins, because there is nothing in this testimony that tends to support or sustain any issues in this law suit.

Court: Overruled.

Mr. Lamb: To which action the defendant excepted.

Mr. Lamb: Now, if it please your honor, all it has to do to stop this case right here, is to examine the law.

Court: Have you any authority on your contention.

Mr. Lamb: Yes, I can cite the court to a number of cases,

exactly the same case as we are trying now. We now ask the court to instruct the jury to return a verdict in favor of the defendant.

Court: Let's see your authority.

After the citation of a number of cases by counsel for the defendant, the court overruled its motion for an in-
[fol. 110] structed verdict, to which ruling, the defendant excepted, and asked that its exceptions be noted of record, which is accordingly done.

Thereupon the court instructed counsel for the defense to present their defense.

This was all of the testimony intr-duced by Plaintiff.

Comes the defendant at the close of plaintiff's evidence in chief and contending that the evidence offered by plaintiff is insufficient to sustain a recovery in her behalf, requests the court to instruct the jury to return a verdict for the defendant.

Refused by the Court, to which ruling of the Court, defendant excepted, and ask- that his exceptions be noted of record, which is accordingly done.

[fol. 111] TESTIMONY OF THE DEFENDANT

A. TOWNSEND, after first having been duly sworn, testified as follows:

Direct examination.

Mr. Lamb:

Q. State your name to the jury?
A. A. Townsend.
Q. Where do you live?
A. Pine Bluff.
Q. What is your business?
A. I am Superintendent of the St. Louis and Southwestern Railway.
Q. You are assistant to Mr. Pettigrew?
A. Yes, sir.
Q. Were you so employed on August 2nd, 1930?
A. Yes, sir.

Q. Do you recall the collision between two freight trains on August 2nd, 1930 at McNeil?

A. Yes, sir.

Q. Did you go to the scene of the wreck?

A. Yes, 5 hours later.

Q. You arrived on the scene 5 hours later?

A. Yes, sir.

Q. Did you see Mr. Simpson there?

A. No, sir.

Q. Did you see him at any place later?

[fol. 112] A. No, sir.

Q. What, if anything, do you know about the possession of train order No. 132? Also train order No. 104, and if you recall where you found them?

A. On the morning of the 3rd of August, about 10 o'clock, I was asked to go to the drug store.

Q. Where, at McNeil?

A. Yes, sir.

Q. Did you see Simpson's purse and watch?

A. Yes, they were wrapped up in a package, and the train orders which he had were also handed to me.

Q. I am now handing you train order No. 104 and train order No. 132 (handing witness paper) which are in evidence. State whether or not those are the two orders that you found at the drug store with the purse and watch of Simpson?

A. Yes, these are the orders.

Q. Whose signature is that at the bottom of those orders?

A. The initials of the train dispatcher who put the orders out.

Q. There is A. T. right there; what is that for?

A. My initials; I put that there to identify them.

Q. That is A. T. there?

A. Yes, sir.

Q. Your initials still appear there?

A. Yes, sir.

Q. And these are two of the train orders that you found?

[fol. 113] A. Yes, sir, and several others.

Q. What part of the orders did you find order 132; I mean was it the first order in the several that you found?

A. Yes, it was the top order.

Q. The first order in the bunch?

A. Yes, sir.

Q. What did you do with these orders after you found them at the drug store?

A. I kept the orders in my possession until I returned to Pine Bluff and then I turned them over to Mr. Pettigrew, the Superintendent.

Q. And these are the same ones that I have just shown you?

A. Yes, sir.

Q. What did you do with the watch and purse?

A. I delivered them to P. D. Miles, to make delivery of same to Mrs. Simpson.

Q. Who was present at the drug store?

A. Mr. Miles, Mr. McDaniels, Mr. Kirkpatrick, he is the young man that was employed in the drug store.

That is all.

Cross-examination.

Mr. Pace:

Q. From whom did you get them?

A. From Kirkpatrick, he was employed in the Drug Store.

Q. You just found them in Kirkpatrick's possession.

A. Yes, sir; I was told that there was some things over at the drug store that belonged to Simpson.

[fol. 114] Q. All you know about them being over there, is what some one told you?

A. Yes, sir.

That is all.

Witness excused.

[fol. 115] A. E. KIRKPATRICK, after first having been duly sworn, testified as follows:

Direct examination.

Mr. Lamb:

Q. Please state your name to the jury?

A. A. E. Kirkpatrick.

Q. Where do you live?

A. At McNeil.

Q. What business are you engaged in?
A. I work in a Drug Store at McNeil.
A. For Dr. Souders?
A. Yes, sir.
Q. How long have you lived at McNeil?
A. About 5 and one-half years.
Q. Do you remember about the wreck that occurred at McNeil in August, 1930?
A. Yes, sir.
Q. Do you recall some property and papers being brought to you at the Drug Store after the collision?
A. I brought them over myself.
Q. Where did you get them?
A. I got a part of them out of his clothing.
Q. Do you mean engineer Simpson, the one that was injured and later died?
A. Yes, I took a part of them out of Mr. Simpson's clothing and a part of them were taken out and handed to me.
Q. Where was the injured man at the time you got the papers?
[fol. 116] A. At the Mendenhall Hotel.
Q. At McNeil?
A. Yes, sir.
Q. Who else was present when that took place?
A. Professor Burns, and one or two others. Mr. Mendenhall was in there a part of the time.
Q. What was it that you took out of his pocket?
A. I took out some train orders.
Q. What you took out, you kept and what was taken out by some one else, that was handed to you; his watch, his purse and whatever it was?
A. Yes, sir.
—. About how many train orders did you take out of his pocket?
A. 7 or 8; more or less. Good many I know.
Q. State whether or not these two orders which later proved to be train orders No. 104 and No. 132; state whether or not you can identify those orders as being some of the orders you got out of the pocket of engineer Simpson?
A. Yes, sir; those are the ones.
Q. Who was in there when you took those papers out of the pocket of Simpson's clothing?

A. I don't believe there was anybody right at the time, he was in the room; probably Mr. Mendehall was in there right at the time.

Q. What pocket did he have them.

A. I think that he had a pair of overalls over his clothing and while they were taking the overalls off, or had [fol. 117] taken them off, I took the orders out of his overall pockets; I am sure it was after they had taken his overalls off.

Q. The overalls had been taken off when you got the orders?

A. Yes, I am sure of that.

Q. Where did you find the purse and watch?

A. I think they were taken out by Dr. Souders and Prof. Burns.

Q. In your presence?

A. Yes, sir.

Q. Where did you take the papers that you took out of Simpson's pocket?

A. I took them over to the Drug Store.

Q. What did you do with them?

A. I wrapped the orders and the watch and purse up in a piece of paper and put them in the safe there in the Drug Store.

Q. What did you later do with them?

A. I turned them over to Mr. McDaniel—and another man.

Q. Was it Mr. Townsend?

A. Yes, that is what I understood his name to be.

Q. That happened there at the Drug Store?

A. Yes, sir.

That is all.

Cross-examination.

Mr. Pace:

Q. All you know about it, you got some 8 or 10 train orders out of his pocket?

[fol. 118] A. Yes, sir.

Q. You never read any of them?

A. No, sir.

Q. You don't say that the orders you turned over to this party were train orders Nos. 104 and 132, do you?
A. No, sir; I don't know.

Redirect examination.

Mr. Lamb:

Q. Was there any blood on the orders?
A. I didn't notice any.

That is all.
Witness excused.

[fol. 119] W. C. McDaniel, after first having been duly sworn, testifies as follows:

Direct examination.

Mr. Lamb:

Q. Where do you live?
A. At McNeil.
Q. What is your business?
A. Cashier clerk for the Cotton Belt.
Q. You were there after the collision occurred?
A. Yes, sir.
Q. After the collision were you present where the body of Simpson was?
A. No, sir.
Q. Did you go with any one to the Souder Drug Store?
A. Yes, sir.
Q. For what purpose?
A. To get his personal belongings, his watch and purse.
Q. Did you find them?
A. Yes, sir.
Q. Where?
A. Kirkpatrick had them locked up in the safe. I went back there with Kirkpatrick and stood there and watched him take the package out of the safe. He went through the package he had some money in it and we listed the money, turned it over to Miles to take back to Pine Bluff to deliver to Mrs. Simpson. Fireman Miles.
Q. What fireman?

[fol. 120] A. Fireman Miles.

Q. What else did you find in the package, if anything?

A. A bunch of train orders.

Q. Do you know how many orders in the bunch?

A. No, not exactly, there must have been 15 or 20. I know that there was quite a number of them.

Q. What did you do with the orders?

A. I gave them to Mr. Townsend and he took charge of them.

Q. The Assistant Superintendent?

A. Yes, sir.

That is all.

Witness excused.

[fol. 121] P. B. Miles, after first having been duly sworn, testifies as follows:

Direct examination.

Mr. Lamb:

Q. Please state your name to the jury?

A. P. B. Miles.

Q. Where do you live?

A. Pine Bluff.

Q. What business are you engaged in?

A. Locomotive fireman.

Q. Were you such on August 2nd, 1930?

A. Yes, sir.

Q. For the Saint Louis and Southwestern?

A. Yes, sir.

Q. Were you over at McNeil shortly after the collision that occurred there August 2nd, 1930?

A. Yes, sir. Went to McNeil on the wrecker out of Pine Bluff.

Q. After you got there, did you go with Mr. Townsend, the Assistant Superintendent of the Company, or anybody else to the Souder Drug Store at McNeil?

A. Yes, sir.

Q. For what purpose?

A. We went over there to get some property some papers of Engineer Simpson.

Q. When was that?

A. On the morning of the 3rd of August. We went over [fol. 122] to the Drug Store and a little fellow over there had some stuff wrapped up in a piece of paper in the safe.

Q. Do you mean Kirkpatrick?

A. I believe so.

Q. He had access to the safe anyway?

A. Yes, he brought the package out. The stuff was wrapped up in a piece of white paper; there was a watch, a pocket book and $11.00 or $12.00 in money, and the only order I saw was the order that he was to meet Second No. 18 at Stamps.

Q. Is that order No. 132?

A. Yes, I never read the other orders; he had a bunch of other orders, and I took the other stuff, the watch the pocket book and the money back to Pine Bluff and turned it over to the Dispatcher and I understood that Mr. Hopkins came down there and got it.

Q. That is Simpson's son-in-law?

A. Yes, sir.

That is all.

Mr. Pace: No cross-examination.

Witness excused.

[fol. 123] N. B. Tolson, after first having been duly sworn, testifies as follows:

Direct examination.

Mr. Lamb:

Q. What is your name?

A. N. B. Tolson.

Q. Where do you live?

A. I live at Texarkana, but I run out of Pine Bluff.

Q. What is your occupation?

A. I am a brakeman.

Q. For the St. Louis & Southwestern Ry. Co.?

A. Yes, sir.

Q. Were you at McNeil or in the vicinity of McNeil, August 2nd, 1930, when the accident occurred just south of the station at McNeil?

A. Yes, I was on the local freight train going south that morning.

Q. You were a brakeman on that train that was standing on the main line headed south?

A. Yes, sir.

Q. What do you know, if anything, about any train order being delivered to the Engi-emen on Engine 775 Extra South while it was at McNeil?

A. I hand-ed that engine order; I gave the order to the fireman.

Q. The fireman on 775 Extra South?

A. Yes, sir.

[fol. 124] Q. Who gave you that order to hand to that engine?

A. Key.

Q. Is he the agent and operator at McNeil, and was he at that time?

A. Yes, sir.

Q. He is in charge of the station there?

A. Yes, sir.

Q. How did he happen to give the order to you to deliver to the Enginemen on 775 Extra South?

A. We were standing on the main line and had the operator blocked away from the engine.

Q. Where were you at the time he ha-d- you this order?

A. I was between my train and Extra 775 South.

Q. And Key was on the opposite side from you?

A. Yes, my train was between me and Key.

Q. How did you get the order from Key?

A. He handed it to me between the cars.

Q. And you in turn handed it to the enginemen on Extra 775 South?

A. Yes, sir.

Q. Which one of the enginemen did you hand it to?

A. To the fireman.

Q. That was Hilburn?

A. Yes, sir.

Q. The fireman on Extra 775 South?

A. Yes, sir.

Q. Did you read the order?

A. No, sir.

[fol. 125] Q. You don't know how the order read?
A. No, sir.

That is all.

Mr. Pace: No cross-examination.

Witness excused.

[fol. 126] F. A. KEY, after having been duly sworn, testifies as follows:

Direct examination.

Mr. Lamb:

Q. What is your name?
A. F. A. Key.
Q. Where do you live?
A. At McNeil.
Q. What is your business there?
A. I am agent and telegraph operator for the St. Louis Southwestern Railway Company at McNeil.
Q. What is your age?
A. I will be 70 years old in about two months now.
Q. How long have you held this position at McNeil?
A. 36 years.
Q. Then you were there August 2nd, 1930 when this collision occurred just south of McNeil?
A. Yes, sir.
Q. Between Extra 775 South and Train 18?
A. Yes, sir.
Q. Did you receive a train order for Engine 775 Extra south that day?
A. Yes, sir.
Q. Can you identify the order you received for this train?
[fol. 127] A. Yes, sir.
Q. What is the paper I show you (exhibiting paper)?
A. That is order No. 132 addressed to C. & E. Extra 775 South dated August 2nd, 1930.
Q. What did you do with that order?
A. I handed a copy of this order to brakeman Tolson to deliver it to Extra 775 South; I had to do that because the local freight was standing in front of the station on the

main line, so I handed the order to Tolson through the local freight to be delivered to this Extra 775 South.

Q. What did he do with it?

A. He handed it up to Extra 775 South.

Q. You were on the side next to the station.

A. Yes, sir.

Q. And in order for you to deliver it you would have had to have gone through the local freight which was at that time standing on the main line in front of the station?

A. Yes, they had just finished brassing a car and it was about ready to back up.

Q. The local freight, you mean?

A. Yes, sir.

Q. Do you know what engineman Tolson handed train order No. 132 to on Extra 775 South?

A. Which one of the enginemen I couldn't swear, but I saw him hand it up. I don't know whether it was the fireman or head brakeman or who it was.

[fol. 128] Q. How many copies of order 132 did you make?

A. I made 3 copies.

Q. Have you with you the one you made for your file?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir. (Witness hands copy to attorney.)

Q. When was this copy you have handed me made?

A. At the same time I made three copies, one for the head end, one for the rear end and one for the office file.

Q. This copy was made at the same time this one was made (exhibiting order) which has been introduced in evidence?

A. Yes, sir.

Q. This is a copy that you made and retained for your office file; you made three at a time?

A. Yes, sir.

That is all.

Cross-examination.

Mr. Pace:

Q. I want to ask you for information; what kind of an order was that that you delivered that day; is it what you call a helping order?

A. Yes, sir.

Q. A helping order is an order that you go out and deliver to the trainmen to keep the conductor from coming into the office after it?

[fol. 129] Yes, to avoid delay of the train.

Q. To keep the train moving, you hand the order up on the run.

A. Yes, sir.

Q. But the regular way is for the conductor to come down into the office and get them and carry them to the engine and read them to the engineer?

A. No only a 31 order. That is the one he signs. That's a holding order.

Q. What is the difference? What is the difference between a holding order and a helping order?

A. The conductor and engineer has to sign a 31 order and a 19 order, you just hand that up to the engineer and conductor.

Q. A helping order as I understand it is where you help another train on through.

A. Yes, sir.

Q. And you hand that kind of an order up in order to keep the train from stopping and causing a delay to the train?

A. Yes, sir.

Q. And that is the kind of order you delivered that day?

A. Yes, sir.

Q. That is called a helping order?

A. Yes, sir.

Q. It's just a little bit irregular for you to give that order to somebody else to hand up to the enginemen, isn't it?

A. No, sir.

Q. You are supposed to deliver the order in person. [fol. 130] Isn't that the rule?

A. No, sir.

Q. I misunderstood them then.

A. I have sent orders to trains by automobiles down to the switch.

Q. Your contention is that anybody around the station can deliver train orders to trains and that will be satisfactory with your company; is that — way you are swearing to?

A. That isn't the custom. No. I mean someone connected with the company.

Q. You are not certain whether Tolson gave this particular order to the fireman or brakeman?

A. No, sir.

Q. You are certain though that he didn't give it to the engineer?

A. I couldn't say for sure because this other train had my view cut off.

Q. The engineer is about the busiest man on a train isn't he? He has to keep his eyes trained down the track and keep a watch out all of the time.

A. I don't know, but I suppose so. However, I never was an engineer, and never ran a train.

That is all.

Redirect examination.

Mr. Lamb:

Q. You spoke of a helping order; how far south; this order 104 says that Extra 775 south has right over No. 18 Pine Bluff to Cross-over McNeil; how far south of McNeil [fol. 131] would this train have to go to be out of its proper place?

A. Down to the switch.

Q. You mean the switch, before you get out on the main line?

A. Yes, sir, down to the dr-rail. I thought that was, what this train was going to do because I went back to my work and was waiting for the local freight to back up and come in behind the Extra 775 South.

Q. You mean back up and get in the clear?

A. Yes, sir.

Q. When you speak of a helping order to get out of town; you don't mean that the engineer has a right to proceed against any other orders that he may have, if it's a violation of his orders?

A. No, sir.

Q. Was this local freight train standing on the main line when this extra 775 South pulled in?

A. Yes, sir.

Q. They had a right out there?

A. Yes, they were working on the main line. I think that they had a meet with No. 18, at McNeil, also.

Q. Explain the difference between a "31" train order and a "19" train order.

A. A "31" order is a holding order; the conductor and engineer both sign a "31" order; the train has to stop and conductor and the engineer sign it. A "19" order is an [fol. 132] order that neither the conductor or engineer signs. You hand up the "19" orders to keep from delaying the trains.

Mr. Pace:

Q. Why didn't you give this Extra 775 South a "31" order that day?

A. I deliver what orders the dispatcher gives me. The orders are put out by the train dispatcher.

That is all.

Mr. Lamb: If it please the court, I would like to talk to some witnesses. I might be able to close this case right here.

Court: All right, we will take a 10 minute recess.

After the absence of counsel for the defense a few minutes he announced that the defense rest.

EXCERPTS FROM RULE BOOK

Mr. Adams: Just a minute please. I would like to read into the record, some rules from the rule book which has been identified as exhibit "D".

Court: All right.

I will read first, rule 220, page 59:

Train orders once in effect continue so until fulfilled, superseded or annulled. Any part of an order specifying a particular movement may be either superseded or annulled.

When a conductor or engineman, or both, is relieved before the completion of a trip, all train orders and instruc- [fol. 133] tions held must be delivered to the relieving conductor or enginemen. Such orders or instructions must

be compared by the conductor and enginemen before proceeding.

Rule 1567, page 135:

They are jointly responsible with the conductor for the safety of the train and the proper observance of the rules; and although they are under the direction of the conductor with regard to the management of trains, they will not comply with any instructions which imperil the safety of the train or involve a violation of rules.

Rule 201, page 56:

For movements not provided by time-table, train orders will be issued by authority and over the signature of the train dispatcher. They must contain neither information nor instructions not essential to such movements. They must be brief and clear; in the prescribed forms when applicable; and without erasure, alteration or interlineation.

Figures in train orders must not be surrounded by brackets, circles or other characters.

That is all.

The defendant rests.

[fol. 134] Mr. Pace: I would like to read into the record a rule or two.

The first rule will be rule 107, page 54. This is the most important rule in the rule book.

"In case of doubt or uncertainty the safe course must be taken."

The next rule is rule 1352, page 112.

"The general direction and government of a train is vested in the conductor. He is responsible for its safe and proper conduct, and all men employed on the train are required to yield a willing obedience to his proper orders."

That is all.

Plaintiff rests.

This was all of the testimony introduced by both plaintiff and defendant.

[fol. 135] PLAINTIFF'S REQUESTED INSTRUCTIONS

Plaintiff's Instruction No. 1

Requested by the Plaintiff and Given by the Court

The court instructs the jury that plaintiff relies for a recovery in this case alone upon the doctrine of discovered peril, and if you find from a preponderance of the evidence that the deceased, A. E. Simpson, was in the employ of the defendant, St. Louis Southwestern Railway Company, as an engineer on a freight train and before the injury in a place of peril on the engine of the train, and that A. D. DeMaine was conductor on said train and in the employ of the defendant, and that said DeMaine, after discovering the peril of the deceased, A. E. Simpson, failed to exercise ordinary care and diligence in the use of the means at his command to avoid injury to the deceased, but carelessly and negligently, after knowledge of the peril of the deceased, permitted deceased to pull his train out on the main line and to continue to run his train on said main line after said DeMaine knew of the peril of the deceased, without making any effort to stop said train, and that the train deceased was pulling and another freight train, operated by the defendant upon said road collided, and that the failure of the said conductor to apply the air and stop the train upon which deceased was riding after discovering the peril of the deceased; (if you find these facts to be true from a preponderance of the evidence) was the proximate cause of the injury, then you will find for the plaintiff and [fol. 136] assess such damages as you may find should be awarded under the evidence and other instructions given in this case.

(Defendant objects and excepts to the action of the court in giving plaintiff's requested instruction No. 1 as follows, because it permits the jury to return a verdict for the plaintiff for some amount on account of the alleged negligence of Conductor DeMaine, and his failure to apply the brakes at the caboose when Simpson was running his train out of McNeil in plain violation of train order #104 which was in his possession. And defendant at the time asked that its exceptions be noted of record which was accordingly done.).

Plaintiff's Instruction No. 2

Requested by the Plaintiff and Given by the Court

I charge you that under the evidence in this case and by the admission of the defendant in its answer that both the defendant, St. Louis Southwestern Railway Company, and the deceased, A. E. Simpson, were engaged in interstate commerce at the time that deceased, A. E. Simpson, received the injuries that resulted in his death, upon which plaintiff bases her claim for damages in this case and that the defendant, St. Louis Southwestern Railway Company, was at that time a common carrier engaged in operating a [fol. 137] railroad in the State of Arkansas and other States, carrying passengers and freight for hire.

(Defendant does not object to the court in giving plaintiff's requested instruction No. 2.)

Plaintiff's Instruction No. 3

Requested by the Plaintiff and Given by the Court

The Court instructs the jury that there is no proof that would warrant the jury in finding that Josephine Hopkins, formerly Josephine Simpson, had any reasonable expectation of contribution from her father had he lived, and you will therefore so find as to her in making up your verdict in this case.

(Defendant does not object to the court giving plaintiff's requested instruction No. 3.)

Plaintiff's Instruction No. 4

Requested by the Plaintiff and Given by the Court

Negligence on the part of either the Railway Company or the deceased might be defined to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what a reasonable and prudent person under the existing circumstances would not have done. You fix the standard for reasonable prudent and cautious men under the circumstances of the case as you find then, according [fol. 138] to your judgment and experience of what that

class of men do under these circumstances, and then test the conduct involved and try it by that standard.

(Defendant does not object to the court giving plaintiff's requested instruction No. 4 as being a proper definition of negligence but does object and except to it for the reason that any instruction in this case relating to the negligence of anyone other than Simpson is abstract and improper under the law applicable to this case, the law being that the conduct of Simpson in running his train out of McNeil in plain violation of train order No. 104 which he had in his possession is in law the sole, proximate cause of his injury and death. And to the giving of said instruction the defendant, at the time, excepted and asked that its exceptions be noted of record which was accordingly done.)

Plaintiff's Instruction No. 5

Requested by the Plaintiff and Given by the Court

Contributory negligence consists in doing something that an ordinary prudent person would not do under the circumstances or the failure to do something that an ordinarily prudent person would do under the circumstances by the party injured that directly contributed to the injury and without which the injury would not have occurred.

[fol. 139] (Defendant objects and excepts to the action of the court in giving plaintiff's requested instruction No. 5 because there is no place in this instruction referring to the conduct of Simpson as being contributory, merely to his injuries and death, since the law applicable to this case makes his conduct in violating his train orders, not merely contributory negligence, but the sole, proximate cause of his injury and death. No. 2. That contributory negligence has no place in this case, except upon a showing that some other employe other than Simpson was the sole, approximate cause of his injury and death and there is no other proof in this case. And defendant at the time asked that its exceptions be noted of record which was accordingly done.)

Plaintiff's Instruction No. 6

Requested by the Plaintiff and Given by the Court

The court instructs the jury that although you may find that the deceased, A. E. Simpson, was guilty of negligence

in leaving the passing track and going out on the main line track with his train and that he thereby put himself in a place of danger, yet, although this be true, the plaintiff would be entitled to recover in this case, if you further find from a preponderance of the evidence that the conductor on said train, A. D. De Maine, after knowledge of the peril of [fol. 140] the deceased, could have avoided injury to the deceased by applying the air and stopping the train, and that he carelessly and negligently failed to act when a reasonably prudent man, situated as he was, would have done so, thereby causing A. E. Simpson to be injured and said injuries resulted in this death.

(Defendant objects and excepts to the action of the court in giving plaintiff's requested instruction No. 6 because it makes the non-action of Conductor De Maine contribute to the injury and death of Simpson, when under the law as applicable to this case, the sole approximate cause of Simpson's injury and death was his own act in running his train out on to the main line and into a collision in violation of his train orders. And defendant at the time requested that its exceptions be noted of record which was accordingly done.)

Plaintiff's Instruction No. 7

Requested by the Plaintiff and Given by the Court

The burden of proof is upon the plaintiff to establish her case by a preponderance of the evidence, and the burden of proof is upon the defendant in this case to establish contributory negligence on the part of the deceased, A. E. Simpson, resulting in his injury, unless such negligence sufficiently appears from the proof introduced by the plaintiff.

(Defendant objects and excepts to the action of the Court [fol. 141] in giving plaintiff's requested instruction No. 7 because it refers to the conduct of Simpson as being merely contributory, when under the law, his conduct was the sole, approximate cause of his injury and death and the evidence in this case clearly so discloses. And defendant at the time requested that its exceptions be noted of record which was accordingly done.)

Plaintiff's Instruction No. 9

Requested by the Plaintiff and Given by the Court

The court instructs the jury that the plaintiff relies alone upon the doctrine of discovered peril for a recovery in this case, and you will not consider any other allegation of negligence set up in the complaint.

(Defendant objects to the action of the court in giving plaintiff's requested instruction No. 9, not because it limits the issue to one and eliminates from the case the alleged negligence with reference to train order mentioned in the complaint, and with reference to the high ball signal alleged in the complaint to have been given by the conductor, but because of the discovery or non-discovery by conductor DeMaine, of Simpson's peril, or failure of DeMaine to act in connection with such discovered peril if discovered, does [fol. 142] not entitle the plaintiff to recover in this law suit. And defendant at the time requested that its exceptions be noted of record which was accordingly done.)

Plaintiff's Instruction No. 10

Requested by the Plaintiff and Given by the Court

You are the sole and exclusive judges of the credibility of the witnesses and the weight to be attached to their testimony, and in determining the weight you will give the testimony of the witnesses, you should take into consideration their interest, if any, in the result of your verdict, their bias or prejudice, if any, they have for or against either party, their means of knowing that about which they testify, the reasonableness or unreasonableness of their statements, and applying your observation of human actions, motives and affairs, you will find the truth and speak that truth in your verdict.

Plaintiff's Instruction No. 11

Requested by the Plaintiff and Given by the Court

If the jury find for the plaintiff they will assess damages for the widow, Effie K. Simpson, and the children, Marie Simpson, Esther Simpson and Alberta Simpson, at

such a sum of money as will fairly and reasonably compensate them for the loss of pecuniary benefits they might reasonably have received and of which they were deprived [fol. 143] by the death of A. E. Simpson, as is shown from the evidence in the case, reducing said sum to its present cash value; also if you find for the plaintiff you will be authorized to assess further damages for the widow, Effie K. Simpson, and the children, Marie Simpson, Esther Simpson and Alberta Simpson, at such a sum as will reasonably compensate for the physical pain and mental anguish suffered and endured by the deceased as a result of said accident, if any, from the time of the alleged injury until his death, as may be shown by a preponderance of the evidence in the case, and if the jury should find that the deceased was guilty of negligence that contributed to the injury, then it would be your duty to diminish the damages, and where the causal negligence is partly attributable to the deceased and partly to the defendant, the plaintiff could not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the railroad company bears to the entire negligence attributable to both.

(Defendant objects and excepts to the action of the court in giving plaintiff's requested instruction No. 11, not on the question of damage, but under the evidence in this case, there are no bases for admeasurement of damages as set forth in this instruction, the law being that the defendant is not chargeable with any legal negligence contributing to [fol. 144] the death of Simpson, but that he alone and his own conduct are entirely liable for his injury and death. And defendant at the time requested that its exceptions be noted of record which was accordingly done.)

Plaintiff's Instruction No. 12

Requested by the Plaintiff and Given by the Court

Under the law of the State it is provided that juries in civil cases may return a verdict when nine of the jury agree to that verdict, and in this case if all twelve of you agree upon a verdict it is only necessary that the verdict be signed by one of you as foreman; but in the event the verdict is reached by nine of you, then it is necessary for each

one of the jurors agreeing to that verdict to sign the verdict.

DEFENDANT'S REQUESTED INSTRUCTIONS

Defendant's Instruction No. 1

Requested by the Defendant and Refused by the Court

You are instructed to return a verdict in favor of the defendant.

(To the action of the court in refusing to give defendant's peremptory instruction No. 1, defendant objected and excepted and ask- that its exception be noted of record, which *is* accordingly done.)

[fol. 145] Defendant's Instruction No. 2

Requested by the Defendant and Given by the Court

Plaintiff as administratrix of the estate of A. E. Simpson is suing to recover damage on account of his injuries resulting in his death and alleged conscious pain and suffering between the time of his injury and his death.

You are instructed that plaintiff cannot recover in this suit unless the deceased, had death not resulted, could in a suit by him recovered for his injuries and resulting pain and suffering.

Defendant's Instruction No. 3

Requested by the Defendant and Refused by the Court

Train order No. 104 issued by the disp*ta*cher at Pine Bluff before Simpson's train left there by its terms gave to his train, which was No. 775, rights over Train No. 18, sometimes referred to in the evidence as First 18, to the cross-ever at McNeil. It is undisputed that Simpson had this order. You are, therefore, instructed that after arriving and taking siding at McNeil, he had no right to take his train from a siding out on to the main line; and it being undisputed that in violation of this order #104 Simpson did take his train from the siding at McNeil out on to the main line where it soon collided with another train, his act

in so doing was the sole, proximate cause of his injuries and death and plaintiff cannot recover in this suit.

[fol. 146] (Defendant at the time excepted to the refusal of the court to give said instruction No. 3 and asked that its exceptions be noted of record which was accordingly done.)

Defendant's Instruction No. 4

Requested by the Defendant and Refused by the Court

It is shown by the evidence that when Simpson's train was at McNeil, operator Key in charge of the station at that place, by himself and assistants delivered train order #132 to DeMaine, conductor, and Simpson, engineer. This train order did not in any way refer to train #18 or First 18, but did refer to second 18 and by its plain terms gave Simpson's train right over Second 18 to Stamps about twenty miles south of McNeil.

You are instructed that train order #132 is clear in meaning and not misleading or incomplete, and did not in any way or to any extent nullify or modify or change order #104, and that, therefore, Simpson had no right on account of order #132 to go out or take his train from the siding at McNeil out on to the main line until after the arrival of #18 at McNeil.

(Defendant at the time excepted to the refusal of the court to give said instruction No. 4 and asked that its exceptions be noted of record which was accordingly done.)

Defendant's Instruction No. 4 "A"

Requested by the Defendant and Given by the Court as Modified

[fol. 147] You are instructed that train order No. 104 is clear in meaning and with that order still in force and effect Simpson had no right for any cause disclosed by the evidence to run his train from the siding at McNeil out on to the main line.

(The court refused to give said instruction No. 4 "A", to which refusal the defendant at the time excepted and asked that his exceptions be noted of record which was accordingly done. And thereupon the court at the request of

plaintiff modified said request by defendant by adding thereto the following:)

And if he did, he was guilty of negligence, and there could be no recovery, unless you further find from a preponderance of the evidence, that A. D. DeMaine, the conductor, after the train was out on the main line discovered that the deceased was in a place of peril and unconscious of the same, and the conductor, carelessly and negligently failed to use the means at his command to stop the train and avoid the injury to the deceased.

(Defendant objected to the modifications by the court of said instruction No. 4 "A" and to the giving thereof as modified for the reason, that as so modified said instruction permits the plaintiff to recover on account of the failure of conductor DeMaine to apply his brakes and stop the train.)

[fol. 148] Defendant's Instruction No. 4 "AA"

Requested by the Defendant and Refused by the Court

You are instructed that train order #132 is clear in meaning and unless nullified, modified or changed, Simpson had no right to run his train out from the siding at McNeil on to the main line.

(To the action of the court in refusing to give defendant's requested instruction No. 4 "AA" the defendant at the time excepted and ask- that its exceptions be noted of record which *is* accordingly done.)

Defendant's Instruction No. 5

Requested by the Defendant and Refused by the Court

As further found of negligence, it is alleged that after the train #775 was out on the main line or going out on to it from the siding at McNeil, conductor DeMaine failed to apply the air brakes from the caboose and thereby stop the train before the collision occurred. You are instructed that such failure on the part of conductor cannot avail the plaintiff in this case, and in your deliberations you will not to any extent or for any purpose consider the failure of conductor to so apply the brakes.

(To the action of the court in refusing to give defendant's requested instruction No. 5 defendant at the time, excepted, and ask- that its exception be noted of record which *is* accordingly done.)

[fol. 149] Defendant's Instruction No. 6

Requested by the Defendant and Refused by the Court

Since it is undisputed in the evidence that engineer Simpson ran his train out from the siding at McNeil onto the main line in violation of train orders which had been delivered to him, you are instructed that his act in so doing is the sole, proximate cause of his injuries and death, and that anything done or not done by conductor DeMaine or any other employee than Simpson upon the train has no bearing in this law suit and you will not consider same in your deliberations; and that since the act of Simpson in violating train orders in evidence became in law the sole and proximate cause of his injury and death, the plaintiff cannot recover in this suit.

(To the action of the court in refusing to give defendant's requested instruction No. 6, defendant at the time excepted, and ask- that its exception be noted of record, which *is* accordingly done.)

Defendant's Instruction No. 7

Requested by the Defendant and Refused by the Court

If you find for the plaintiff, you will state separately the amounts you find on account of probable contributions by Simpson to his family and the amount you may find on account of pain and suffering or anguish experienced by Simpson.

[fol. 150] (To the action of the court in refusing to give defendant's requested instruction No. 7, defendant excepted and ask- that its exception be noted of record, which *is* accordingly done.)

Defendant's Instruction No. 8

Requested by the Defendant and Given by the Court

If train order No. 132 was received by Simpson, then it makes no difference whether he read it or not. If he re-

ceived it he should have read it and became chargeable with full knowledge of all that the order contained.

COURT'S INSTRUCTIONS

Court's Instruction No. 1 "B"

Given by the Court on Its Own Motion

If you find for the plaintiff, the form of your verdict should be: We, the jury, find for the plaintiff and assess whatever damage you think she is entitled to under the proof.

If you find for the defendant, the form of your verdict should be: We, the jury, find for the defendant.

If all 12 of you gentlemen agree upon a verdict, it will only be necessary for one of you gentlemen to sign that verdict; but if 9 agree upon a verdict, the 9 agreeing will sign their names thereto, whatever your verdict is, return same into open court.

These are all of the instructions that were requested, [fol. 151] given and refused.

Thereupon the court gave the following instructions.

After argument of counsel, the jury retired to the jury room to consider of its verdict and after spending some time in their deliberations, they returned the following verdict:

"We, the jury, find for the plaintiff and assess damages at Twenty Eight Thousand Dollars ($28,000.00).

(Signed) —— ——, Foreman.

The court inquired of the jury if this was their verdict and they answered in the affirmative.

Thereupon the court excused the jury from further consideration of the case.

[fol. 152] In Circuit Court of Prairie County

Order Approving Bill of Exceptions

On this day comes the St. Louis Southwestern Railway Company by its attorneys, Lamb and Adams, and presents to the court for its consideration and approval the bill of exceptions filed herein on this date, the same having been prepared and filed within the time authorized by the court.

And upon consideration of said matter, the court finds that the bill of exceptions presented herein is true and correct, and that same should be duly approved by the court and made a part of the record.

It is therefore, considered, ordered and adjudged by the court that the bill of exceptions filed here- be and the same is hereby approved by the court and made a part of the record in said cause.

This 19th day of March, 1931.

(Signed) Wm. J. Waggoner, Circuit Judge, 17th Judicial Circuit of Arkansas.

[fol. 153] Certificate of court stenographer omitted in printing.

[fols. 154 & 155] Bill of costs omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 156] Minute entry of submission, November 2, 1931, omitted in printing.

IN SUPREME COURT OF ARKANSAS

2231

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,

vs.

EFFIE K. SIMPSON, Administratrix of the Estate of A. E. SIMPSON, Deceased, Appellee

Appeal from Prairie Circuit Court, Southern District

JUDGMENT—November 9, 1931

[fol. 157] This cause came on to be heard upon the transcript of the record of the circuit court of Prairie County, Southern District, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all her costs in this Court in this cause expended, and have execution thereof.

[fol. 158] IN SUPREME COURT OF ARKANSAS

No. 203

ST. LOUIS SOUTHWESTERN RY. CO.

v.

SIMPSON

OPINION—November 9, 1931

McHANEY, J.:

Appellee's intestate, A. E. Simpson, was, at the time of his death 56 years old and had been in the employ of ap-

pellant thirty years as an engineer. On August 2, 1930, he was directed by appellant to run engine 775, known as Extra 775, a freight train, from the Pine Bluff, Arkansas, shops to the Texarkana, Arkansas, yards. Before leaving Pine Bluff the conductor and engineer were each given order No. 104, the material part of which is as follows: "Eng. 775 run extra Pine Bluff shops to Texarkana yards, has right over No. 18 Eng. unknown Pine Bluff shops to cross over McNeil." This being an extra train it did not operate by any schedule in the time tables, but was operated under telegraphic orders addressed to the train which bore the No. of the engine. Under the above order, with which the engineer, fireman, conductor and three brakemen were familiar, they proceeded to the crossover at McNeil where they passed from the main line to the side track. At McNeil the engineer and conductor were given order No. 132 reading as follows: "Train order No. 132, August 2, 1930, McNeil. To Extra 775 South. Second 18 Eng. 778 meet Extra 775 South at Stamps." The fireman and head brakeman were on the engine with the engineer and presumably all of them read this order. Evidently they all misinterpreted it, no doubt believing it referred to train No. 18 mentioned in the order first above quoted, and that they could continue safely to Stamps, some few miles further south. Engineer Simpson did not bring his train to a stop but slowly proceeded through the station on the siding, and headed out on the main line towards Stamps. [fol. 159] When the swing brakeman Craig, who was in the cupola of the caboose saw the train was not going to stop, he hollowed out to conductor DeMaine, "No. 18 is not here yet. If you have not got anything more on No. 18, you had better stop. DeMaine said: 'We have a meet with Second 18 at Stamps.' I says, 'If you haven't got something on No. 18, you haven't got it, pull the air' ". Craig then testified that the conductor told him to hand him the train orders that they had received out of Pine Bluff and out on the line, and that he rushed up into the cupola, got the orders where they kept them on a clip board, and handed them to the conductor who took them and held them in his hand looking at them until they had a head-on collision with train No. 18 about a mile south of the station at McNeil. Rear brakeman Dorman on Extra 775 south testified to substantially the same facts as did Craig and in addition

said that he thought that the train was going to stop and that he intended to cut the crossing at the public highway, but saw the station agent at McNeil, Key, standing there with an order in his hoop which Key took out and handed to him. About that time the caboose took a lunge like they were leaving. He opened the order, read it and handed it to Conductor DeMaine which is the same order above mentioned as No. 132. DeMaine told him to "high-ball the switch" which meant to go ahead, and that he looked out to see that the negro attending the switch properly threw it. He then went into the caboose and asked DeMaine where they were going for No. 18 and that DeMaine said "Let's see what we got out of Pine Bluff on 18." He then said to the conductor, "What did you get here on No. 18?" And the conductor replied: "All we got here was an order to meet Second No. 18 at Stamps." Dorman then said, "Is [fol. 160] that all you got here?" DeMaine said, "Yes". Dorman said, "Pull the air, as you haven't got anything on No. 18 then, stop this train." To which the conductor replied: "I will pull the air". He said that swing brakeman Craig was standing there and the conductor told him to go up and get the orders and that he told the conductor to "pull the air and then look at the orders". He said that he started to pull the air himself but that the conductor told him not to and that while the conductor was standing looking at the orders, their train collided with No. 18. He further said that when he asked the conductor about the orders, he told him to pull the air, started to pull it himself and was directed not to do so, they were seven to ten car lengths out on the main line. It was shown that there were three appliances on the caboose for pulling the air. Pulling the air means to open a valve which causes the air brakes to set on the wheels of the car and stop the train. It was shown that if the air was pulled gradually that the train could have been stopped in 12 to 14 car lengths.

As a result of this unfortunate collision five persons lost their lives and another seriously injured—the engineer, fireman and head brakeman on Extra 775 were killed; the engineer and fireman on train 18 were killed and the head brakeman thereon seriously injured.

Appellee brought this action under the Federal Employers' Liability Act against appellant who is engaged in interstate commerce, to recover damages for her intestate's

injuries and death. The complaint alleged three grounds [fol. 161] of negligence but before the trial all allegations of negligence were withdrawn except the following: "On account of the conduct of DeMaine, conductor on said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear end and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died." The answer admitted that appellant was engaged in interstate commerce, denied that it was guilty of any negligence and alleged that Simpson's injuries and death were caused solely by his own negligence resulting "not only in his injuries and death but in the death of several others of his co-employees and in the destruction of property of this defendant of the value of more than $100,000;" that Simpson's negligence consisted in running and operating his train in violation of orders which he at the time well knew.

A tral to a jury resulted in a verdict and judgment in appellee's favor for $28,000.

As we understand the respective contentions of the parties, the sole question presented for our decision is whether the evidence is sufficient to sustain the verdict and judgment against appellant. Appellant's request for a peremptory instruction was denied. It is true that in the brief of counsel for appellant, complaint is made of the instructions given at the request of appellee and of the refusal of the court to give certain instructions requested by appellant; but this complaint is based on the ground that appellee was [fol. 162] not entitled to recover at all, and therefore, not entitled to any instructions, and that the instructions requested by it were, in effect, peremptory, which, as is contended, was demanded by the law and the evidence.

It is conceded by both parties that liability if any is governed by the Federal Employers' Liability Act and only one ground of negligence was submitted to the jury as shown by instruction No. 9, given at appellee's request, to wit: "The court instructs the jury that the plaintiff relies alone upon the doctrine of discovered peril for a recovery in this case, and you will not consider any other allegation

of negligence." It is contended, however, by able counsel for appellant that the doctrine of discovered peril or the "last clear chance doctrine" is not applicable to this case; that it is a case of concurrent negligence only, appellee's intestate and conductor DeMaine both being guilty of negligently operating the train in violation of express orders, and is subject to the comparative negligence rule in the Federal Employers' Liability Act as construed in Davis v. Kennedy, 266 U. S. 147; Frese v. C. B. & Q. R. Co., 263 U. S. 1; Unadilla Valley Ry. Co. v. Caldine, 278 U. S. 139; Unadilla Valey Ry. Co. v. Dibble, 31 Fed. (2d) 239; Bradley v. N. W. Pac. R. Co., 44 Fed. (2d) 683; Yadkin R. Co. et al. v. Sigman, Admx., 120 S. E. (N. C.) 56, reversed by memorandum opinion in 267 U. S. 577, on the authority of Davis v. Kennedy, supra, and Frese v. C. B. & Q. R. Co., supra.

Appellee contends that because the conductor, DeMaine, failed and refused to stop the train by pulling the air at a time when it was moving out from the side track on to the main line, after he had been told by two brakemen that the [fol. 163] order he received at McNeil did not relate to Train No. 18, but to Second 18, and after he had refused to permit one of the brakemen to pull the air and thereby prevent a collision, he discovered the perilous situation of them all, especially engineer Simpson, and was therefore guilty of negligence, independent of the negligence of Simpson in moving his train contrary to order 104. Whereas appellant contends "that the failure of DeMaine to act does not enter into the case and that from a legal standpoint the conduct of Simpson constitutes the sole, proximate cause of his injury and death." Therefore appellant says that the cases as above cited are decisive of this case against appellee and that no recovery can be had.

The discovered peril doctrine, or the doctrine of the "last clear chance" as it is sometimes called constitutes an exception to the rule that the contributory negligence of the plaintiff is a bar to his action. Under this doctrine where one discovers the perilous situation of another in time, by the exercise of ordinary care to prevent injury to him, it is his duty to do so, and he is guilty of negligence if he fails to do so, which is regarded in law as the proximate cause of the injury, and this too regardless of the contributory negligence of the injured person. Such a person

is regarded in law as having the last clear chance to prevent injury or death to another and it is his duty to do so. It is sometimes referred to as the doctrine of Davies v. Mann, 10 M. & W. 546, and the principle is now generally recognized by the courts of both England and America. It has been announced in numerous decisions by this court, by the Supreme Court of the United States and by text writers. It has also been held to apply in cases brought under the Federal Employers' Liability Act. Mo. Pac. Ry. Co. v. [fol. 164] Skipper, 174 Ark. 1083. Petition for certiorari to this court was denied by the Supreme Court of the United States. Mo. Pac. Ry. Co. v. Skipper, 276 U. S. 629. It is true that the facts in this case present an unusual situation in which to apply the rule of discovered peril, but we are unable to perceive why it should not apply. The usual situation for the application of the rule is for the operatives of the train to discover the perilous situation of another on its tracks in time to avoid injuring him and generally arises under our lookout statute. As said in 20 R. C. L. p. 141, Sec. 115, "It is not, however, limited to any particular class of cases. It is proper to allow a recovery where the driver of a motor car sees a pedestrian in time to avoid injury by stopping and fails to reduce his speed or bring his car to a stop. And it has been held that when a bathhouse keeper is notified of a bather's disappearance so soon thereafter as to justify a reasonable inference that an immediate search in the water would result in rescue before death, has no one present to attempt the rescue, and fails to make an immediate search in the water for the missing bather, it is error, in an action to recover damages on account of the death, to direct the jury to return a verdict for the defendant." It has also been said by the Supreme Court of the United States in Grand Trunk R. Co. v. Ives, 144 U. S. 408, that: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years: That [fol. 165] the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's neg-

ligence." See also L. & N. R. Co. v. Hurt, 13 So. (Ala.) 130.

In this case we think it fair to assume that engineer Simpson, the fireman, the head brakeman and the conductor misunderstood or misinterpreted order 132 received at McNeil directing them to meet Second 18 at Stamps. They evidently made a mistake in thinking that said order referred to train No. 18 over which they were given right-of-way to McNeil and not to Second 18, about which they had no information so far as this record discloses, and was itself an extra train going north and following closely train No. 18. Having misunderstood the order engineer Simpson moved his train out from the side track on to the main line evidently believing that he had orders to meet train No. 18 at Stamps. We cannot believe that he intended to commit suicide, or to endanger his own life and that of so many others. But the rear brakeman and the swing brakeman, Dorman and Craig, did not misunderstand order No. 132, and, realizing the danger to themselves and to everybody concerned, urged conductor De Maine to stop the train and prevent possible injury and death. He prevented Dorman from stopping the train and told him he would do it himself, but instead of stopping the train and then reading his orders, he permitted the train to go on to destruction while reading his orders. We are therefore of the opinion that the negligence of conductor De Maine in failing and refusing to stop the train, and of Dorman and Craig in failing to stop it, was the sole and proximate cause of the injury, because [fol. 166] they knew and realized the perilous situation into which the negligence of engineer Simpson, in failing to understand his orders, had taken them, but did not use the means at their command to avert the tragedy. We think the rule announced in the cases above cited and relied upon by learned counsel for appellant have no application to the facts in this case. Although they were all brought and prosecuted under the Federal Employers' Liability Act, they were brought and prosecuted on the theory of comparative negligence as defined in the act and not under the doctrine of discovered peril or "last clear chance". We are furthermore of the opinion that none of the said cases presents a state of facts showing a supervening act of negligence, arising subsequent to and independent of the contributory negligence of Simpson, such as is the fact in this

case. The fact that De Maine, Dorman and Craig knew the perilous situation, and, with three different instrumentalities near at hand, the operation of any one of which would have taken but an instant, failed to exercise ordinary care to use them to avert the injury, is such a supervening act of negligence as to invoke the discovered peril doctrine and constitutes the sole and proximate cause of the injury, regardless of Simpson's contributory negligence in failing to understand his orders.

It necessarily follows from what we have said that the judgment must be affirmed. It is so ordered.

[fol. 167] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed Nov. 25, 1931

Comes appellant, St. Louis Southwestern Railway Company, and suggests that in the opinion of this Court, rendered November 9, 1931, there are certain errors as follows:

1. There is no basis as disclosed by the record for the inference by the Court that Simpson misconstrued Train Order No. 132 and thereby ran out of McNeil under the impression that Order No. 104 had been modified or annulled and that he was therefore to meet No. 18 instead of Second No. 18 at Stamps. The record discloses that Order No. 132 was delivered to the enginemen while the train was slowly passing through the yards at McNeil. It was delivered to the fireman or head brakeman and when thus delivered are, or should be, first handed to the engineer who reads them and then returns them to the fireman and head brakeman to read. Train No. 18 and Train Second No. 18 are as separate and distinct things to railroad men as black and white. The original orders 104 and 132 were in evidence. The figures and words are all plain and as shown by the evidence the orders are in regular and perfect form. If Simpson read Order No. 132 as he should have done then he knew that it read Second 18, and knowing that, would also know that it had no reference to No.

[fol. 168] 18, and was negligent in running his train out. If he did not read the order then he could not have misconstrued it and of course still knew that Order No. 104, requiring him to meet No. 18 at McNeil, was in force. To say that he misconstrued Order No. 132 is equivalent to saying all three of the men on the engine also misconstrued it or did not correctly read it. We therefore, think the inference by the Court that Simpson read Order No. 132 as applying to Train No. 18 is an erroneous view.

2. The opinion mingles or confuses the doctrine of discovered peril with the rule of last clear chance. While it is true that in the last clear chance rule there must be discovered peril, yet, there is a line of demarcation which is that the rule of last clear chance cannot be applied where the negligence of the injured party continues down to the moment of the injury and is a contributing cause of it. Whether Simpson read his order or did not read it, read it incorrectly or ignored it, cuts no figure so far as his negligence is concerned. That is continued to the moment of the collision and was a contributing cause of it and, as shown by authorities cited in appellant's brief, this excludes the application of the last clear chance rule.

3. Viewing the conduct of Simpson and the conduct of conductor DeMaine the most that can be said against appellant is that their acts of omission or commission may be thought of as concurring to bring about the collision. But the courts have said that this shall not be considered from a legal standpoint as concurrent negligence but that in law [fol. 169] the conduct of Simpson shall be considered as the sole, proximate cause of his injuries and death, and that the conduct of DeMaine shall not be considered as a legally contributing cause. It has not been and is not the contention of appellant that considered from a legal standpoint there is any concurrent negligence disclosed by this record and we think the federal courts construing precisely similar conduct have so held in all cases that have come before that court.

Davis v. Kennedy, 266 U. S. 147.
Frese v. C. B. & Q. R. Co., 263 U. S. 1.
Unadilla Valley Ry. Co. v. Caldine, 278 U. S. 139.

Unadilla Valley Ry. Co. v. Dibble, 31 Fed. (2d) 239.
Bradley v. N. W. Pac. R. Co., 44 Fed. (2d) 683.
Yadkin R. Co. et al. v. Sigman, Admx., 120 S. E. (N. C.) 56, reversed by memorandum opinion in 267 U. S. 577.

Wherefore appellant prays that rehearing herein be granted and judgment of the trial court reversed.

Respectfully submitted.

Carter, Jones & Turney, Lamb & Adams, for Appellant.

[File endorsement omitted.]

[fol. 170] Minute entry of submission, November 30, 1931, omitted in printing.

IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—December 7, 1931

Being fully advised, the petitions for rehearing filed in the following causes are by the court severally overruled, viz:

* * * * * * *

2231, St. Louis Southwestern Railway Company v. Effie K. Simpson, Administratrix.

[fol. 171] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR A STAY OF JUDGMENT PENDING APPLICATION FOR A WRIT OF CERTIORARI—Filed Jan. 4, 1932

Comes the appellant, St. Louis Southwestern Railway Company and petitions the court to grant it a stay of judgment and execution pending application for a writ of certiorari in the Supreme Court of the United States, and for grounds therefor states:

I

The record in this case is voluminous and will have to be copied by the Clerk of the Supreme Court of the United States before petition for certiorari may be presented.

Wherefore Petitioner prays that the judgment and execution herein be stayed for a period of three months to enable Petitioner to present application in the Supreme Court of the United States for a writ of certiorari, upon the giving of bond, as provided by Act of Congress, approved February 13, 1925, which provides as follows:

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on [fol. 172] writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned upon the giving of good and sufficient security, to be approved by such judge or justice, and if the aggrieved party fails to make the application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

That amount of bond required be fixed and reasonable time granted in which to file same.

Respectfully submitted.

Carter, Jones & Turney, Lamb & Adams, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 173] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER STAYING JUDGMENT—Filed Jan. 4, 1932

On this day comes appellant, St. Louis Southwestern Railway Company and by its petition filed herein repre-

sents to the Court that it proposes to file with the Supreme Court of the United States a petition for a Writ of Certiorari to the end that the judgment of this Court heretofore rendered herein may be stayed pending its application for Writ of Certiorari and determination thereof.

Appellant has filed bond in the sum of Thirty Thousand Dollars ($30,000.00) with good and sufficient surety with the Clerk of this Court, conditioned as provided by law.

Wherefore it is considered, ordered and adjudged that the judgment heretofore rendered in this cause be and it is hereby stayed for sixty days from this date, pending appellant's application for said Writ of Certiorari, such stay to be effective until such application shall be abandoned or until the same shall be determined by the Supreme Court of the United States.

This order is made on this 4th day of January, 1932.

Jesse C. Hart, Chief Justice, Supreme Court of Arkansas.

[File endorsement omitted.]

[fols. 174 & 175] Supersedeas bond on petition for certiorari for $30,000, approved and filed January 4, 1932, omitted in printing.

[fol. 176] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 14, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1818)

FILE COPY

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FEB 2 193
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 674

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

HAROLD R. SMALL,
Counsel for Petitioner.

N. F. LAMB,
A. L. ADAMS,
Of Counsel.

(36,488)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 674

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the St. Louis Southwestern Railway Company, a corporation, respectfully presents to this Court this, its petition for a writ of certiorari, addressed to the Supreme Court of the State of Arkansas, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in that Court wherein your petitioner was appel-

lant, and Effie K. Simpson, as Administratrix of the Estate of A. E. Simpson, was appellee, together with the opinion therein, for review and determination of said cause by this Court.

Statement of Facts.

In this behalf your petitioner states the following facts:

This action was brought under the Federal Employers' Liability Act in the Circuit Court of Prairie County, Southern District of the State of Arkansas, for damages for personal injuries sustained by freight engineer A. E. Simpson and for his death (R. 1-4), with a resulting verdict and judgment for $28,000.00 (R. 10, 11).

The plaintiff's assignment of negligence on which recovery was had follows, the other assignments of negligence having been abandoned at the trial:

> "On account of the conduct of De Main, conductor upon said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents, and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died" (R. 3, 89).

The answer of petitioner denied the negligence alleged, and stated:

"Defendant says that the primary and only negligence resulting in said collision was that of said Simpson, in running and operating his train as he at the time well knew, in violation and disobedience of orders and directions given to him by defendant" (R. 6).

The undisputed evidence shows that Simpson, the engineer, was ordered by petitioner's Train Order 104 *to stop the train and keep it on the siding at McNeil, Arkansas, until Train No.* 18 *from the opposite direction had passed, and that notwithstanding this order he caused the train to proceed from the siding onto the main track, and at increased speed, until the head-on collision with Train* 18 *occurred, resulting in this death, the death of his two trainmen, the death of the engineer and fireman on Train* 18, *and in great property loss.*

Simpson was a locomotive engineer of a freight train running from Pine Bluff, Arkansas, *south* to Texarkana, Arkansas (R. 21, 98). On this occasion he left Pine Bluff early in the morning. His train was Extra 775 and being an extra was running under train orders, and not on schedule time under a time card, as regular trains do (R. 29, 98). Before leaving Pine Bluff he received *Train Order No.* 104, reading as follows:

"Eng. 775 run extra Pine Bluff shops to Texarkana yards, has right over No. 28 Eng. 779 Pine Bluff shops to Saline, right over No. 18 Eng. unknown to Pine Bluff shops to cross over McNeil" (R. 31, 98).

The words "has right over No. 28 Eng. 779, Pine Bluff shops to Saline" have no bearing in this suit.

Train No. 18 was a regular freight train running *north* from Texarkana to Pine Bluff, and being a regular train shown on the time card was referred to not as an "extra" but as "No. 18" (R. 98).

Pursuant to Train Order No. 104 *Simpson ran his train Extra No.* 775 *south to the cross-over at McNeil, Arkansas, and there went in on a siding where, in obedience to Train Order* 104, *he should have waited until No.* 18 *arrived and passed, at McNeil* (R. 43, 98). *This he did not do but ran in on the siding through McNeil and out onto the main line, without stopping, and collided with Train No.* 18 *about a mile south of McNeil* (R. 98), *five persons being killed in the collision* (R. 49, 99).

When passing through McNeil the conductor, De Main, and Simpson, engineer, each received Train Order No. 132, reading as follows:

> "Train Order No. 132, August 2, 1930, McNeill. To Extra 775, south. Second 18 Eng. 778 meet Extra 775 south at Stamps" (R. 35, 73).

This order was found in Simpson's pocket after the collision (R. 73, 98).

This order 132 did not authorize Simpson to leave the siding (R. 43, 98).

Order 104 remained in effect (R. 46, 98).

Second 18, mentioned in Train Order No. 132, which Simpson's train was directed to meet at Stamps, south

of McNeil, was also a northbound freight train, following No. 18.

The train orders were in usual and proper form (R. 44), and both the engineer and conductor had copies of all orders (R. 73). It was also the duty of the fireman and the head brakeman riding on the engine and the swing and rear brakemen riding in the caboose to know the contents of all train orders (R. 44). *Train orders may be modified or rescinded only by another train order* (R. 83).

There was a personal and primary duty on the engineer not to proceed with the train onto the main track, and the violation of this duty continued until the collision with Train 18 occurred.

The sole cause of the collision was the violation of petitioner's Train Order No. 104.

Recovery was allowed on the following evidence to support the last clear chance theory of respondent: De Main was conductor and Dorman and Craig were swing and rear brakemen of that train (R. 21). They were riding in the caboose. As the engineer Simpson ran the train out of the siding onto the main line at McNeil, Train Order No. 104 occurred to one or both of the brakemen (R. 25, 43, 98), and one of them said to conductor De Main "What have you got on No. 18?" (R. 25, 43.) The brakeman then proposed to stop the train by application of the air from the caboose. De Main told them not to do so but to bring him the orders. One of the brakemen went up into the cupola, got the orders, brought them to De Main, and

he was reading them when the collision occurred (R. 25, 26, 98).

It thus appears that conductor De Main did not "discover" any "peril" in the situation until then, when it was too late to do anything. Recovery was grounded and permitted, therefore, on the testimony of trainmen in the caboose at the rear of Simpson's forty-three car train, to the claimed but unproved effect that the conductor knew of the engineer's peril in time thereafter to have stopped his train, and stopped Train 18 from colliding with it.

Respondent plaintiff's instructions are based on the last clear chance theory (R. 85-91).

Petitioner defendant's instructions are to the effect that under the conceded facts no recovery could be had (R. 91-95).

Reasons Relied on for the Allowance of the Writ.

I.

The Arkansas trial and Supreme Courts erred in failing to follow controlling Federal decisions.

Recovery under the Federal Employers' Liability Act ought not to have been had where the fault of the employee, as here, is such that it would be a perversion of the act to allow recovery.

The negligence of engineer Simpson in disregarding Train Order 104 to stop and wait on the siding at McNeil and his running his train into collision a mile further on with opposing train No. 18, having the right-of-way on the main track, is such conduct as precludes,

under Federal controlling decisions, recovery for his injuries and death resulting from the collision.

His negligence is properly deemed the sole proximate cause of his injury and the doctrine of last clear chance on which recovery was allowed by the Arkansas courts on the theory the conductor, realizing the peril of the engineer, had time to stop *his* train, and so could have prevented the *two* trains from running into each other head-on has no place here.

Under controlling Federal decisions where there was a violation by the injured of like safety train orders with resulting collision it was held there could be no recovery even though there was also a failure of some other employee to perform his duty.

The following controlling Federal decisions construing the Federal Employers' Liability Act support the foregoing:

Great Northern Ry. v. *Wiles,* 240 U. S. 444;
Frese v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1;
Davis v. *Kennedy,* 266 U. S. 147;
Yadkin R. R. Co. v. *Sigmon,* 267 U. S. 577 (186 N. C. 519, 120 S. E. 56);
Unadilla Valley R. Co. v. *Caldine,* 278 U. S. 139;
Virginian R. Co. v. *Linkous* (C. C. A., 4th), 230 Fed. 88;
Blunt v. *Pennsylvania R. Co.* (C. C. A., 6th 1925), 9 Fed. (2d) 395;
Unadilla Valley R. Co. v. *Dibble* (C. C. A., 2nd, 1929), 31 Fed. (2d) 239;
Southern Ry. Co. v. *Hylton* (C. C. A., 6th, 1930), 37 Fed. (2d) 843; certiorari denied 281 U. S. 745;

Bradley v. *N. W. Pac. R. Co.*, 44 Fed. (2d) 683 (C. C. A., 9th, 1930);
Paster v. *Pennsylvania R. Co.* (C. C. A., 2d, 1930), 43 Fed. (2d) 908.

Leading cases decided by the highest State courts are to the same effect:

Gillis v. *New York, N. H. & H. R. Co.* (Mass., 1916), 113 N. E. 212;
Davis v. *Payne* (Oregon, 1923), 216 P. 195;
Washington, B. & A. E. R. Co. v. *Cook* (Maryland, 1924), 125 Atl. 172;
Hudson v. *Norfolk & W. Ry. Co.* (W. Va., 1929), 146 S. E. 525; certiorari denied 279 U. S. 866;
Roberts Federal Liabilities of Carriers, 2d Edition, Vol. II, Sec. 874, page 1709.

II.

Where an engineer violates a stop and wait order of his employer railroad company and collision, with injury or death to him, results, neither he nor anyone for him has a right to recover from his employer, whose imperative safety order he violated, on the ground there was negligence of another employee causing the collision. The last chance doctrine cannot be applied. Same cases.

III.

(*a*) Even were the last chance doctrine applicable to a case of this kind, it is not applicable to this case because the conductor in the caboose did not know the engineer was violating the stop and wait order or that

there was an outstanding stop and wait order until the very moment of the collision, when it was too late to do anything. Actual knowledge of the conductor was pleaded, but not proved. The conductor, when the question was raised, asked for the orders, got them, and was reading them to see their contents, when the collision occurred (R. 25, 26, 98).

(*b*) In the Federal courts the last clear chance doctrine does not include cases where, by the exercise of ordinary care, defendant, through its conductor, might have discovered the person injured in peril in time to avoid the injury.

Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972, 973, and cases cited.

IV.

The last clear chance doctrine, if applicable to a case of this kind, is not applicable in the Federal courts, where, as here, the engineer's negligence was continuous and operative down to the moment of the injury.

Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972, 973, and cases cited;

St. Louis & S. F. Ry. Co. v. *Schumacher,* 152 U. S. 77, 81;

Kansas City S. R. Co. v. *Ellzey,* 275 U. S. 236, 241, 242;

Kinney v. *Chicago, Great Western R. Co.,* 17 Fed. (2d) 708, 709.

V.

The Arkansas trial and Supreme Courts, therefore, erred in giving, over defendant-petitioner's objections,

plaintiff-respondent's instructions Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12, and each of them, and in refusing to give, petitioner excepting, defendant-petitioner's instructions Nos. 1, 3, 4, 4-*a*, 4-*aa*, 5, 6, and 7, and each of them, and in refusing to sustain defendant-petitioner's motion for new trial on said grounds, respondent's said instructions being on the last chance theory, and defendant-petitioner's instructions being on the theory plaintiff-respondent was not entitled to recover.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Arkansas, sitting at Little Rock, Arkansas, commanding the said Court to certify and send to this Court, on the date to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Arkansas, had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that the said judgment of the Supreme Court of the State of Arkansas be reversed by this Honorable Court, and for such further relief as may seem proper, and your petitioner will ever pray.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By HAROLD R. SMALL,
Counsel.

N. F. LAMB.
A. L. ADAMS.

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STATUTES CITED.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 674

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Arkansas is reported in — S. W. (2d) —. It is found on pages 97-104 of the Record. The date of the opinion and judgment of the Supreme Court of Arkansas affirming the judgment is November 9, 1931.

Petitioner's motion for a rehearing was overruled, and judgment became final December 7, 1931.

Section 2171, Crawford and Moser Digest of Statutes of Arkansas.

II.

Jurisdiction.

1. Petition for certiorari is made upon authority of Section 237-*b*, Judicial Code, as amended by the Act of February 13, 1925 (43 Stats. L. 936).

2. The date when the judgment became final was January 7, 1931, when petitioner's motion for rehearing was overruled (R. 106).

3. Respondent sued petitioner under the Federal Employers' Liability Act (35 Stats., L. 65, Ch. 149, U. S. C., Title 45, Sec. 51) (R. 1-4). Recovery was had under respondent's instructions Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12 (R. 85-91).

The following grounds are relied upon as the basis of this Court's jurisdiction:

(*a*) The approval of the Supreme Court of Arkansas of the action of the trial court in refusing to give petitioner's instruction directing the jury to return a verdict for petitioner (R. 91, 97-104).

(*b*) In refusing to give petitioner's requested instructions Nos. 1, 3, 4, 4-*a*, 4-*aa*, 5, 6, 7, and each of them (R. 91-95).

(*c*) The affirming by the Supreme Court of Arkansas of the action of the trial court in all of these re-

spects, including the trial court's action in overruling petitioner's motion for new trial (R. 97-104) based on the foregoing errors of the trial court.

4. The cases believed to sustain the jurisdiction of this Court are:

Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 130;
Davis v. *Kennedy*, 266 U. S. 147;
Great Northern Ry. Co. v. *Wiles*, 240 U. S. 144.

III.

Statement of Facts.

Having heretofore stated the case for petitioner in its petition for certiorari, the statement in the petition should for brevity be taken as the statement here.

IV.

Specification of Errors.

The trial court and the Supreme Court of Arkansas erred in holding that respondent was entitled to recover under the Federal Employers' Liability Act, and in the giving of each of respondent's instructions, in the refusal to give each of petitioner's instructions, and in the overruling of petitioner's motion for new trial on those grounds.

ARGUMENT.

The Decision of the Arkansas Supreme Court is Contrary to and in Conflict With Prior Federal Decisions.

The trial court and the Arkansas Supreme Court erred in refusing to give petitioner's instructions of-

fered at the close of all the evidence, which were to the effect that respondent was not entitled to recover from petitioner.

Respondent was not entitled to recover for the following reasons:

I.

The Arkansas trial and Supreme Courts erred in failing to follow controlling Federal decisions.

Recovery under the Federal Employers' Liability Act ought not to have been had where the fault of the employee, as here, is such that it would be a perversion of the Act to allow recovery.

The negligence of engineer Simpson in disregarding Train Order 104 to stop and wait on the siding at McNeil and his running his train into collision a mile further on with opposing train No. 18, having the right-of-way on the main track, is such conduct as precludes, under Federal controlling decisions, recovery for his injuries and death resulting from the collision.

His negligence is properly deemed the sole proximate cause of his injury and the doctrine of last clear chance on which recovery was allowed by the Arkansas courts on the theory the conductor, realizing the peril of the engineer, had time to stop *his* train, and so could have prevented the *two* trains from running into each other head-on has no place here.

Under controlling Federal decisions where there was a violation by the injured of like safety train orders with resulting collision it was held there could be no recovery even though there was also a failure of some other employee to perform his duty.

The following controlling Federal decisions construing the Federal Employers' Liability Act support the foregoing:

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Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1;
Davis v. *Kennedy*, 266 U. S. 147;
Yadkin R. R. Co. v. *Sigmon*, 267 U. S. 577 (186 N. C. 519, 120 S. E. 56);
Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 139;
Virginian R. Co. v. *Linkous* (C. C. A., 4th), 230 Fed. 88;
Blunt v. *Pennsylvania R. Co.* (C. C. A., 6th 1925), 9 Fed. (2d) 395;
Unadilla Valley R. Co. v. *Dibble* (C. C. A., 2nd, 1929), 31 Fed. (2d) 239;
Southern Ry. Co. v. *Hylton* (C. C. A., 6th, 1930), 37 Fed. (2d) 843; certiorari denied 281 U. S. 745;
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Leading cases decided by the highest State courts are to the same effect:

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Davis v. *Payne* (Oregon, 1923), 216 P. 195;
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Hudson v. *Norfolk & W. Ry. Co.* (W. Va., 1929), 146 S. E. 525; certiorari denied 279 U. S. 866; *Roberts Federal Liabilities of Carriers*, 2d Edition, Vol. II, Sec. 874, page 1709.

Where an engineer violates a stop and wait order of his employer railroad company, and collision, with injury or death to him, results, neither he nor anyone for him has a right to recover from his employer, whose imperative safety order he violated, on the ground there was negligence of another employee causing the collision. The last chance doctrine cannot be applied.

Same cases.

We shall refer briefly to the facts and holdings in but four cases of this Court.

In *Great Northern Railway Co.* v. *Wiles*, 240 U. S. 444, a freight train broke in two, due, as the Court assumes, to the company's negligence. Wiles was the rear brakeman. It was his duty to go back and flag the following train. He did not do so, and he was killed in the ensuing rear-end collision. His representatives brought the suit. In reversing the judgment for plaintiff, this Court said:

> "There is no justification for a comparison of negligences or the apportioning of their effect. * * * In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy."

In *Frese* v. *Chicago, etc., R. Co.*, 263 U. S. 1, there was a collision at a grade crossing of two railroads.

One of the engineers was killed, and this action against his employer resulted. His contributory negligence was not involved. It was his duty under the rules to bring his train to a full stop and ascertain that the way was clear before proceeding. He brought his train to a stop, and proceeded, and was in collision. The other train was approaching from the fireman's side, and it was plainly the fireman's duty to keep watch for such approach and give notice to the engineer. The fireman had neglected this duty. Without that neglect, the collision would not have occurred. This Court denied any recovery on behalf of the engineer, and said:

> "Moreover the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, and it would be a perversion of the Employers' Liability Act (45 U. S. C. A., Sec. 53) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

In *Davis* v. *Kennedy,* 266 U. S. 147, Kennedy's representatives brought an action under the Federal Employers' Liability Act. Kennedy had been the engineer of train No. 4, going west from Nashville. He collided with train No. 1 coming east to Nashville. There were double tracks at Nashville uniting into one a little further west. Under train schedules, No. 1 had the right of way, and the crew of No. 4, including Kennedy, had standing positive orders not to pass on to the

single track unless they knew that No. 1 had finished its use and entered on the double track. Kennedy thought he saw No. 1 on the double track; so did the other members of his crew; but they were all mistaken. In the Tennessee court it was held that the other members of the crew, as well as Kennedy, were as much bound to look out for No. 1 as he was, and that therefore through them the railroad was negligent, and so under the Act became liable to Kennedy. It seems clear enough that there was negligence in this respect by the other employees, and that, if they had done their duty, the collision would not have occurred. This Court so assumes; but the judgment was reversed, the Court saying:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

In *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, a collision had taken place near Bridgewater, and Caldine, the conductor of train No. 2, had been killed. Caldine had the definite order that his train was to pass No. 15 in the Bridgewater yard, and that No. 15 was to take a siding there and allow No. 2 to pass. On this occasion, for some unknown reason, Caldine directed his train to go on beyond Bridgewater, and a

collision occurred. The Court below (246 N. Y. 365, 159 N. E. 172) had found the necessary negligence of the railroad through employees other than Caldine, because there had grown up a custom by which the conductor of No. 15, if he was a little late, would telephone that fact from his last station before Bridgewater, and the agent at Bridgewater would take this message and deliver it to Caldine, thus giving to him a further warning that he must obey the rule. On this occasion the telephone message was sent. The agent said he told the motorman of No. 2; the motorman denied this; but at any rate, through somebody's negligence, the customary special notice and warning did not reach Caldine. This Court held that there was no cause of action, saying:

> "The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine or one who stands in his shoes is not entitled as against the Railroad Company that employed him to say that the collision was due to any one but himself. He was in command. * * * He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was * * * brought about by his own acts. * * * A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given

him another motive for obeying the rule that he was bound to obey."

These cases demonstrate that respondent was not entitled to recover.

In the case at bar it was the personal, primary and imperative duty of the engineer, Simpson, to obey the safety Train Order 104 and stop on the siding, and not proceed onto the main track until opposing train No. 18 had passed.

In *Atlantic Coast Line Railroad Co.* v. *Davis*, 279 U. S. 34, 39, a case that did not involve a collision of trains, but did involve the principle here in question, this Court said:

> "And the inevitable conclusion from all the evidence is that he voluntarily abandoned the safe position * * * and placed himself in a position of extreme danger * * * one of obvious danger, in which he would inevitably be struck if the boom made a full swing, unless he moved out of its path, and thereby through his own negligence as the sole and direct cause of the accident, brought on his own death. Under these circumstances there is plainly no ground upon which the liability of the Railroad Company may be predicated."
>
> "A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act" (*Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, 142).

The sole cause of Simpson's death was his disregard of Order 104.

II.

The Arkansas courts allowed recovery on the last clear chance doctrine as an applicable doctrine in this case on the basis of the testimony to the effect that the conductor in the caboose "after discovering the peril of the engineer" negligently failed to stop his train before the collision and so failed to avoid the collision of the two trains, with the resulting injury and death to the engineer.

As shown, this doctrine is not applicable under the foregoing authorities.

Even were the last chance doctrine applicable to a case of this kind, it is not applicable to this case because the conductor in the caboose did not know the engineer was violating the stop and wait order, or that there was an outstanding stop and wait order until the very moment of the collision, when it was too late for him to do anything. Actual knowledge of the conductor was pleaded, but not proved. The conductor, when the question was raised, asked for the orders, got them, and was reading them to see their contents, when the collision occurred.

So, as a matter of fact, the conductor had not discovered the peril of the engineer before the collision. Under the Federal decisions in cases where the last chance doctrine is applicable, it is held that it is necessary for the claimant to prove actual knowledge, and not merely that the conductor should have known of the peril.

Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972.

Furthermore, the last clear chance doctrine as applied in the Federal courts is not applicable when, as here, the engineer's violation of his order continued as a proximate cause of the collision up to the moment of the collision.

St. Louis & S. F. Ry. Co. v. *Schumacher,* 152 U. S. 77;
Kansas City S. R. Co. v. *Ellzey,* 275 U. S. 236;
Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972, 973.

The Arkansas Supreme Court stresses the fact that the Arkansas case of *Missouri Pacific R. Co.* v. *Skipper,* 174 Ark. 1083, was left to stand, and certiorari was denied by this court, 276 U. S. 629. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

U. S. v. *Carver,* 260 U. S. 482, 490;
Atlantic Coast Line R. Co. v. *Powe,* 283 U. S. 401, 403, 404.

An examination of the Skipper case will show it to hold simply this: That Skipper, entirely free from negligence, was injured as the result solely of the negligence of a co-employee. That case therefore has no bearing here.

This case should be reversed because the controlling decisions of this Court and of the lower Federal courts deny any right of recovery in respondent.

We submit that the petition for the writ should be

granted, and that the judgment of the Supreme Court or Arkansas on final hearing should be reversed.

Respectfully submitted,

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By HAROLD R. SMALL,
Counsel.

N. F. LAMB,
A. L. ADAMS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 674.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

EFFIE K. SIMPSON, As Administratrix of the Estate of A. E. SIMPSON, Deceased,
Respondent.

REPLY BRIEF OF PETITIONER.

HAROLD R. SMALL,
Counsel for Petitioner.

N. F. LAMB,
A. L. ADAMS,
Of Counsel.

(36,488)

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REPLY BRIEF OF PETITIONER.

I.

Respondent's brief, pages 1 to 10, sets forth facts stated to be in addition to those set forth in petitioner's petition for certiorari and brief.

The alleged additional facts will be found, we believe, to be merely an enlargement of, but in no material respect different from those stated by petitioner.

Respondent admits, page 4, that it was the duty of every one of the crew, including the engineer Simpson, to stop and wait at McNeil until train No. 18 arrived.

It is unquestioned that the train did not so wait, but that the engineer proceeded with the train from the siding at McNeil onto the main track and into collision head-on with train No. 18.

At pages 5 and 6 of petitioner's petition the fact basis of the last clear-chance doctrine was stated in effect to be that the conductor in the caboose, when called on by brakemen to stop the train, asked for the train orders and got them from the cupola and while reading them the collision occurred.

Respondent's brief, page 5, furnishes the statement of the witness for respondent to such effect as follows:

> "Craig was standing there and he told Craig to get up there and hand him the orders; Craig did that and while he (De Maine) was looking at them, we hit" (Rec., p. 43).

It thus appears conceded the conductor did not know the contents of train order 104 or that it was then effective, and so called for the train orders and while examining them the collision occurred.

Along with this testimony of respondent that the collision occurred while the conductor was reading the train orders, other testimony of respondent is by respondent referred to tending to show that the train could have been stopped short of the actual point of collision if the conductor had complied with the request of the brakeman

at the time the brakeman made the request to apply the brakes, but before the time the conductor secured the orders to find out how they read. This evidence is referred to in order to show, as contended for by respondent at page 10, that there would have been 2,800 feet between the point at which the train might have been stopped had the conductor applied the brakes when the brakeman requested him to, and the actual point of collision. This contention entirely disregards the fact the petition alleges the conductor **after** discovering the peril of Simpson negligently failed to stop the train and that respondent's testimony is the conductor only actually knew Simpson was violating train orders at or after the moment of collision. Had the conductor stopped his train he could not thereby stop oncoming train 18 which, after making the curve, came into collision with the conductor's train. The stopping of one train would not stop the other, and it cannot be fairly said that the collision would have been avoided had Simpson's train been stopped by the conductor's applying the brakes when requested by the brakeman.

The negligence of Simpson in disobeying the order continued every moment of the time from the time the train left the siding until the collision, and it therefore cannot be said, as a fact as respondent contends, that any negligence of the conductor was LATER in point of time to that of Simpson, the engineer.

II.

At pages 12 to 27 respondent seeks to justify the action of the Arkansas courts in allowing recovery.

At page 13 it is admitted that the only claimed basis of liability was the petition allegation to the effect that De Maine, the conductor, "after discovering the peril of the deceased A. E. Simpson," negligently "failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died."

Recovery, therefore, was on the theory that the conductor had discovered the peril of Simpson and thereafter negligently failed to stop the train.

The evidence is, as above stated, that the conductor whose attention was called by the brakemen to their understanding of the contents of the order were called on by the conductor to furnish the orders from the cupola of the caboose, which were secured, and the conductor was reading them to determine their effect when the collision happened. It thus appears by respondent's evidence that the conductor did not know until at or after the collision what order 104 contained, or whether it was still an outstanding order. Recovery should have been

denied because it was not shown the conductor discovered the peril in time to stop the train and avoid the collision.

It is necessary under federal decisions that actual knowledge be proved to establish a last-chance case (Wheelock v. Clay, 13 Fed. [2d] 972, cited with approval in Kansas City S. R. Co. v. Ellzey, 275 U. S. 236, 241).

Assuming, notwithstanding that the conductor had discovered the peril through Simpson's disobedience of the train order, and had thereafter negligently failed to cause the train to stop, and that its stopping would have been at a place short of where train 18, coming around the curve, would have stopped, it is the basic contention of respondent that this conduct on the part of the conductor was later in point of time than the negligence of Simpson in violating the order, though such violation by Simpson continued from the time he left the siding until the time of the collision.

The mere statement of this contention, it would seem, ought to end it.

Respondent, arguing on this basis, takes the position that in the Wiles, Frese, Davis, Sigmon and Caldine cases this Court merely held that the negligence of the injured one occurred at the same time as the negligence of some other employe of the railroad company, and in none of these cases denied recovery if there was negligence on the part of the railroad employes later in point of time. These cases have been digested in our opening brief, along with the citation of numerous others in support of the proposi-

tions appearing on page 4 of petitioner's brief. In these cases it appears that without the negligence of the railroad employe other than the claimant the accident would not have occurred. Such was the conclusion reached by Judge Dennison in referring to these cases in Southern Railway Co. v. Hilton (C. C. A. 6th, 1930), 37 Fed. (2d) 843, certiorari denied 281 U. S. 745. Such was also the conclusion reached in Unadilla Valley R. Co. v. Dibble (C. C. A. 2nd, 1929), 31 Fed. (2d) 239, and Bradley v. Northwestern Pac. R. Co. (C. C. A. 9th, 1930), 44 Fed. (2d) 683. In all of these cases this and the lower courts considered how manifestly unjust it would be to hold an employer liable for the results of a collision resulting in great loss of life and property caused by a train operative violating safety train orders.

The holding has been that it would be a perversion of the act to allow recovery in such a case.

Respondent does not even refer to this basic reason for these cases, but resorts to the apparently baseless contention that because the conductor was as negligent in his passive conduct as the engineer was in his active conduct of going upon the main track into collision, recovery should therefore be had on behalf of the one actively negligent. In the Caldine case this Court disposes of such a contention:

> "A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act."

At page 12 of petitioner's brief authorities were referred to for the proposition that the last-clear-chance doctrine does not prevail in the federal courts in a case of this sort, where the engineer's violation of his order continued as the proximate cause of the collision up to the moment of collision.

At page 27 respondent cites and quotes from Kansas City Southern Railway Co. v. Ellzey, 275 U. S. 236, cited by petitioner. The matter quoted by respondent is from page 241 of the opinion. We quote first the two sentences appearing in respondent's brief at page 27, and then in addition the matter that follows, to show the holding of this Court:

> "This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the Chunn case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril, or unaware of it only through carelessness, had in fact a later opportunity than the plaintiff to avert an accident (Grand Trunk R. Co. v. Ives, 144 U. S. 408, 428, 36 L. ed. 487, 492, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 558, 35 L. ed. 270, 272, 11 Sup. Ct. Rep. 653). **In the cases applying the rule the parties have been engaged in independent courses of negligent conduct.** The classic instance is that in which the plaintiff had improvidently left his animal

tied in a roadway, where it was injured by the defendant's negligent operation of his vehicle (Davies v. Mann, 10 Mees. & W. 546, 152 Eng. Reprint 588, 19 Eng. Rul. Cas. 190). **It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later.**

"On the facts assumed by the Circuit Court of Appeals—that Merchant was driving the car recklessly, with respondent's encouragement or acquiescence—**the respondent and Merchant were engaged in a common venture, which, acting together, they were carrying on in a careless manner. In such a case their courses of conduct are not sufficiently independent to let it be said that either one or the other had in fact a later opportunity to avoid the consequences of their joint negligence.** (Compare St. Louis & S. F. R. Co. v. Schumacher, 152 U. S. 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479; Wheelock v. Clay [C. C. A. 8th], 13 F. [2d] 973; Kinney v. Chicago G. W. R. Co. [C. C. A. 8th], 17 F. [2d] 708; Denver City Tramway Co. v. Cobb, 90 C. C. A. 459, 164 Fed. 41).

"We think that the doctrine of the last clear chance was not involved here."

It is submitted that under the foregoing authority and the cases cited in support the last-clear-chance doctrine does not apply in this case, because the conduct of the engineer and the conduct of the conductor were not sufficiently independent to let it be said that either the one or the other had, in fact, a later opportunity to avoid the consequences of their joint negligence.

The last-clear-chance doctrine does not apply where, as

here, the engineer's negligent conduct continued with that of the conductor to the time of collision.

The conclusion was reached by this Court in the Caldine case, in a suit on behalf of the conductor, that recovery could not be had. Such conclusion was reached by the lower federal court in the companion case of Unadilla Valley R. Co. v. Dibble (C. C. A. 2nd, 1929) 31 Fed. (2d) 239, brought in behalf of the engineer injured in the same accident.

We therefore submit:

(1) That the petition allegation that the conductor, after discovery of the peril of the engineer, negligently failed to stop the train in time was not proved, because it was shown that the conductor only knew of the engineer's violation of the order at or after the collision, and because, as a matter of fact, it does not follow that, had the train been stopped, the collision would have been avoided with train 18 as it came around the curve, the engineer of that train having every reason to proceed in the belief that the track was clear.

(2) That the federal courts hold that the plaintiff must show actual knowledge before the doctrine of the last clear chance can be applied.

(3) That the last-clear-chance doctrine should not be applied where, as here, the causal negligence of the engineer in violating the order continued to the time of the

collision itself. Any negligence of the conductor could not, therefore, be later in point of time.

(4) It is a perversion of the act to permit a recovery caused by Simpson's violation of the stop-and-wait order as a result of which the collision, the deaths and loss of property occurred. Simpson's negligence is properly deemed the sole proximate cause of his injury.

We respectfully submit that this is a case in which the writ should properly issue.

Respectfully submitted,

HAROLD R. SMALL,
Counsel for Petitioner.

N. F. LAMB,
A. L. ADAMS,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1931.

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v. No. 674.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED ..... *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE CORRECTING INACCURACIES AND OMISSIONS CONTAINED IN BRIEF FOR PETITIONER.

In petitioner's brief, statement of the evidence supporting respondent's right to recover on the doctrine of the last clear chance is confined to the last 14 lines at the bottom of page 5 and the first line at

the top of page 6. That meager statement is inadequate and inaccurate. We call the court's attention to the following facts, in addition to those stated in petitioner's brief, which support respondent's recovery on the ground of discovered peril, or the last clear chance:

Not only engineer Simpson, but the entire crew on the southbound train, before leaving Pine Bluff, received order No. 104, giving them right-of-way over train No. 18 (the north-bound train with which they collided) from Pine Bluff to McNeil (R. 22, 30, 41). No order was ever received by conductor DeMaine, or any other member of the crew of the south-bound train, extending the right-of-way of that train over train No. 18 any further south than McNeil. When this south-bound train arrived at McNeil, train No. 18 had not reached that point. It was the duty of the crew of the south-bound train to wait at McNeil for the arrival of train No. 18. Brakeman Dorman testified:

> "Q. After you got to McNeil, what was done, if anything, what was said, if anything?
>
> "A. I remember that we got an order at McNeil. The conductor was standing in the door of the caboose. I was on the lower step. The train was moving along slowly and I thought it was going to stop, and I had intended to cut the crossing there at the public highway crossing, so Key, the agent, was standing there with an order in his hoop and handed it to me and I caught it with my left hand. The caboose took a lunge like we were leaving. I shoved the order open and read it and then handed it to conductor DeMaine.

"Q. What did the order say?

"A. It said: 'Second 18 Eng. 778 meet Extra 775 South at Stamps.'

"Q. All right, go ahead?

"A. The caboose took another lunge. At that time the caboose was about that road crossing. DeMaine was standing there in the door of the caboose, so he went on into the caboose, and when the caboose got down about halfway between the depot and the passing track switch DeMaine came out of the caboose on the right-hand side of the train and says 'high ball the switch.' High Ball in railroading means to go ahead (R. 42).

* * *

"Q. Go ahead; you went into the caboose?

"A. I went into the caboose and asked conductor DeMaine where we were going for No. 18. He says, 'Let's see what we got out of Pine Bluff on 18.' I says to him, 'What did you get here on No. 18?' He says, 'All we got here was an order to meet Second No. 18 at Stamps.' I says, 'Is that all you got here?' He says, 'Yes.' I says, 'Pull the air as you haven't got anything on No. 18 then, stop this train.' He says, 'I will pull the air.' He told me not to pull the air. Craig was standing there and he told Craig to get up there and hand him the orders; Craig did that and while he (DeMaine) was looking at them, we hit. I says, 'Pull the air and then look at the orders.' I started to pull the air but he told me not to."

* * *

"Q. About how far out on the main line were you when you asked conductor DeMaine about the orders and when you told him to pull the air, and when you started to pull the air and

he told you not to pull the air; how far were you from this switch?

"A. 6, 8 or 10 car lengths", (R. 43).

* * *

"Q. The only order he got at McNeil was to meet Second 18 at Stamps, as you have just detailed to the jury?

"A. Yes, sir.

"Q. Did he ever pull the air?

"A. No, sir."

* * *

"Q. DeMaine, he was your conductor on the Extra 775 South?

"A. Yes, sir.

"Q. You were under him?

"A. Yes, sir.

"Q. According to the rules and regulations he had charge of the train?

"A. Yes, sir" (R. 44).

Brakeman CRAIG testified:

"A. I was in the cupola looking down, so I hollered out 'No. 18 isn't here yet.' At that time the local was still standing on the main line. I says, 'If you haven't got anything more on No. 18 you had better stop.' He didn't say anything. By that time Dorman had gone out of my sight. I don't know what happened to him. I immediately got down out of the cupola and I met the conductor coming in at the door, so I asked him what he had on No. 18 (R. 24).

"Q. All right, go ahead Mr. Craig, I believe you stated that you met conductor DeMaine coming in at the door?

"A. Yes, I asked him what he had on No. 18, and he says, 'We have a meet with Second No. 18 at Stamps.' I says, 'If you haven't got something on No. 18, you haven't got it, pull the air' (R. 25).

* * *

"Q. I would like for you to state what was said when he came in at the door?

"A. When he came at the door of the caboose, I asked him what he had on No. 18; he told me that he had a meet with Second 18 at Stamps. I says, 'If you didn't get something on No. 18 here, you haven't got it. Pull the air.' He told me to hand him the orders out of the cupola that he had received out of Pine Bluff."

* * *

"Q. Where was the caboose then with reference to the depot, the time you got down out of the cupola and handed the conductor the orders?

"A. Near the highway road crossing; just a little south of the highway crossing.

"Q. That is south of the depot?

"A. Yes, sir.

"Q. About how far south of the depot is that crossing?

"A. Just a short distance, I couldn't say exactly.

"Q. The switch where you went out on the main line is how far south of the highway crossing?

"A. About 30 or 35 car lengths.

"Q. On down to the switch where you went onto the main line?

"A. Yes, sir (R. 26).

"Q. What did you mean when you told him to pull the air?

"A. I meant for him to stop the train.

"Q. Was there some apparatus on the caboose where the air could be applied?

"A. Yes, sir.

"Q. What was it, please?

"A. Air valves.

"Q. Where was it located?

"A. In three different places on the caboose.

"Q. Where, please?

"A. There is one located on the north end, one on the south end, and one up in the cupola of the caboose.

"Q. How long would it take to work either one of those apparatuses?

"A. That depends on where you are.

"Q. If you could reach one?

"A. Just a short time.

"Q. Can you give the jury some idea?

"A. All that is necessary is to press down on the valve.

"Q. That releases the air and it immediately takes effect?

"A. Yes, sir, it locks the wheels of the train.

"Q. You stated that he had no other orders on No. 18 except what he had gotten at Pine Bluff?

"A. None that I knew anything about.

"Q. While you were standing there with conductor DeMaine, did anybody else come in?

"A. Yes, Dorman came in; however, I don't think he came in until we had passed over the south switch.

"Q. Dorman was the other brakeman?

"A. Yes, sir.

"Q. When he came in, tell the jury what he said to conductor DeMaine?

"A. He told him to pull the air and read the orders later.

"Q. Did the conductor do that?

"A. No, sir" (R. 27).

This south-bound train in charge of conductor DeMaine, on which engineer Simpson was killed, contained 43 cars and the caboose (R. 27).

These cars averaged about 40 feet in length, so that this train was about 1,760 feet in length (R. 54).

The caboose had not gone more than 10 car lengths, or 400 feet, south of the south end of the switch onto the main line at the time Brakeman Dorman reminded conductor DeMaine that he did not have any order in regard to train No. 18 except the order requiring them to meet it there at McNeil, and told the conductor to pull the air and started to pull the air himself and was ordered by the conductor not

to do so (R. 43). So the front end of the train at that time was less than 2,200 feet south of the south end of the McNeil switch. If conductor DeMaine had pulled the air, or permitted brakeman Dorman to pull it, when Dorman urged him to do so, the train could easily have been stopped in a distance of 12 or 15 car lengths, or 500 or 600 feet (R. 29, 45).

By actual measurement, the distance from the south end of the McNeil switch down to the point where the engines of the two trains collided is 5,641 feet (R. 53). Throughout this entire 5,641 feet, the track is straight and there was no obstruction to have prevented the men on the engine of train No. 18 from seeing the south-bound train, if conductor DeMaine had pulled the air or permitted brakeman Dorman to pull the air and stopped the train, when urged to do so by Dorman; and, since the front end of the south-bound train was then less than 2,200 feet south of the McNeil switch and the train could have been stopped in 500 or 600 feet, the front end of that train, if conductor DeMaine had pulled the air or permitted the brakeman to pull it when urged to do so, would not have been, when stopped more than 2,800 feet south of the switch, which would have left a clear space of more than 2,800 feet between the front end of the south-bound train, if its conductor had permitted it to be stopped when urged by his brakemen to do so, and the north end of the north-bound train when that train reached the point where the collision occurred, affording ample distance for the north-bound train No. 18 to have been stopped after

coming into plain view of the south-bound train. Train No. 18 had just rounded a sharp curve when the collision occurred.

The collision, therefore, was caused by the negligence of conductor DeMaine, not in forgetting the terms of order 104, which required him to stop at McNeil until train No. 18 arrived, nor in misconstruing order 132, which was the only order he received at McNeil and which told him to meet train Second 18 at Stamps, but by his later negligence in failing to pull the air and stop his train and in refusing to permit his brakeman, Dorman, to do so, after his attention had been pointedly called by both of his brakemen to the fact that the train was proceeding on the main line in positive violation of the orders, making a collision with train No. 18 imminent.

II.

ARGUMENT

Counsel for petitioner, in their brief, say that "under controlling Federal decisions where there was a violation by the injured of dike safety train orders, with resulting collision, it was held there could be no recovery even though there was also a failure of some other employee to perform his duty"; and counsel then cite five decisions of this court which they say sustain their contention. But in no one of the cases cited by petitioner was the issue of discovered peril, or the doctrine of the last clear chance, in any way involved; and, since that is the only issue involved in the instant case, it follows that none of the cases cited by petitioner can have any controlling effect in the case at bar. In no one of the cases cited by petitioner was it contended by the party seeking to recover that, after the injured party's negligence had placed him in peril, any other servant of the railroad company had discovered his peril in time to have saved him from injury by the exercise of reasonable care; but, in every one of the cases cited by petitioner, the contention of the party seeking to recover was, that the injury was caused by the concurrent and contemporary negligence of the party injured and certain other servants of the railroad company, and recovery was sought under the doctrine of comparative negligence, it being admitted in every one of said cases the negligence of the party injured contributed as a concurrent proximate cause

of the injury. But in this case the only ground on which respondent sought to recover damages was:

> "On account of the conduct of DeMaine, conductor upon said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died" (R. 3, 12, 89).

The first case cited by petitioner is *Great Northern Railway Co.* v. *Wiles*, 240 U. S. 444. In that case, Wiles was rear brakeman on a freight train which broke in two by the draw-bar pulling out of the sixth car from the engine, which caused the train to stop instantly. Wiles was riding in the caboose at the rear end of the train, which was run into from 3 to 5 minutes later by a passenger train following it and he was killed. The administrator of his estate sued the railroad company, charging negligence against the company in permitting the draw-bar to pull out. The evidence in the case showed that, when the train stopped after the draw-bar had pulled out, it then became the duty of Wiles, who was the rear brakeman, to "go back immediately with stop signals a sufficient distance to insure full protection." Instead of performing that duty that devolved upon him when the train stopped, he remained in the caboose for 3 to 5 minutes and until the passenger train ran into the caboose and killed him. Of course, this court held in that case that the

negligence of Wiles himself in failing to perform the duty that devolved upon him when his train broke in two and stopped to go back immediately with stop signals so as to prevent the other train from running into his train, was the sole proximate cause of his death. His negligence was the sole proximate cause of that collision because, even if the company had been negligent in permitting the draw-bar to pull out, Wiles' negligence was committed after he had discovered the effect of such negligence on the part of the company and in ample time to have avoided any damage therefrom if he had performed the duty that devolved upon him after the draw-bar had pulled out and the train had stopped. In that case, the accident occurred at a sharp curve and the men on the engine of the passenger train did not know and could not have known of the presence of the train that had stopped in front of them until they were upon it, and no negligence at all was charged against them. So that, in the Wiles case, the question determined by this court was whether the negligence, if any, on the part of the railroad company in permitting the draw-bar to pull out, contributed as a proximate cause to the death of Wiles; and this court held, that since Wiles, by the performance of the plain duty that devolved upon him after the draw-bar pulled out, could easily have prevented the passenger train from running into his train, that his failure to perform that duty which he had an opportunity to perform after he discovered the negligence of the company, if any, in permitting the train to break in two, was the sole proximate cause of his death.

But in the case at bar, the negligence of the deceased engineer, Simpson, was committed when he misread order 132 at McNeil as directing his train to proceed to Stamps and meet train No. 18 there, whereas the order said for them to meet *Second* 18 at Stamps instead of train No. 18, and that act of negligence, on his part, was committed when he misread said order 132 and left the switch at McNeil and pulled out onto the main line; while the negligence of conductor DeMaine, on which respondent based this suit, was committed after the said negligent act of the engineer had been performed and after the conductor had discovered the peril brought about by its performance; for the negligence of conductor DeMaine, upon which respondent relied for recovery in this case, consisted in the conductor's refusal to pull the air, or to permit his brakeman, Dorman, to pull it, in the caboose and thereby stop the train, after both of the brakemen in the caboose had pointedly reminded the conductor that the train was proceeding southward on the main line in violation of orders and was in immediate peril of colliding with train No. 18.

The next case cited by petitioner is *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1. In that case, Frese was engineer on a Burlington train and was killed by a collision between his train and a Wabash train at a point in Illinois where the tracks of the two roads crossed. An Illinois statute put the duty solely upon the engineer, when approaching such a crossing, to bring his train to a full stop and "positively ascer-

tain that the way is clear and that the train can safely resume its course before proceeding to pass the crossing." Of course, engineer Frese violated his duty under said statute, or the collision could not have occurred. His administratrix based her suit upon the contention that the fireman was also negligent in not discovering the other train and she offered evidence tending to show that the fireman was seen to be looking straight ahead when, if he had looked to the left, he could have seen the other train; and it was contended that the fireman thus contributed to the cause of the collision. There was no contention whatever in that case that the fireman, or anyone else, discovered that the engineer had negligently failed to perform his duty and had thereby put himself in peril, the contention of the plaintiff in that case being that the fireman was as ignorant of the peril as was the engineer himself. If, in the Frese case, it had been shown that the fireman discovered before the collision occurred, that the Wabash train was approaching the crossing and that the engineer was not aware of it and then, after discovering such perilous situation, the fireman had refused to do anything to stop the train and avoid the collision, then the Frese case would have been similar to the case at bar; but, had such been the facts proved in the Frese case and had the administratrix of Frese's estate based her suit upon the doctrine of discovered peril, as respondent has done in this case, there can be no doubt but that this court would have held the railroad company liable for the death of Frese upon

the ground that the failure of the fireman to exercise reasonable care to stop the train after such discovery of the peril, would then have been the sole proximate cause of the collision.

The next case cited by petitioner is *Davis* v. *Kennedy*, 266 U. S. 147. In that case, Kennedy was engineer on train No. 4 running westward out of Nashville. He was killed by his train colliding with train No. 1 running eastward toward Nashville, at a point just west of a place called Shops. Train No. 1 had the right-of-way west of Shops and the crew of No. 4 had instructions never to pass Shops unless they knew that No. 1 had arrived there. Between Nashville and Shops the conductor on No. 4 told Kennedy that the train was crowded and he would depend upon Kennedy to look out for train No. 1, which Kennedy agreed to do; but Kennedy failed to look out for train No. 1 and ran his train on beyond Shops and collided with train No. 1. This court, in that case, held that the negligence of Kennedy, under the facts of that case, was the sole proximate cause of his death and that his administratrix could not recover; but the facts in that case are not at all similar to the facts in this case. If, in that case, the conductor, after telling engineer Kennedy to look out for train No. 1 at Shops, had been told by his brakemen, as their train was leaving Shops, that train No. 1 had not arrived at Shops and that they were in imminent peril of meeting it on the main line upon which they were proceeding and if the conductor had been urged by his brakemen to pull the air

and stop their train at a time long enough before the collision occurred to have afforded ample opportunity for him to do so and thereby avoid the collision, and if the conductor, after being so informed by his brakemen of the negligence of his engineer and the peril of the situation and after having been so urged by his brakemen to stop the train, had refused either to pull the air himself or to permit his brakemen to do so, then the case of *Davis* v. *Kennedy* would have been similar to this case; but, if such had been the facts in that case and if that suit had been based upon the doctrine of discovered peril as the present case is, there can be no doubt that this court would have held the administratrix of Kennedy had a right to recover for his death.

The next case cited by petitioner is *Yadkin R. Co.* v. *Sigmon*, 267 U. S. 577 (186 N. C. 519). That case is no more in point than the other cases cited by counsel, and for the same reason. There was no discovered peril in the Sigmon case. In that case, all of the train crew alike forgot their order to wait at Yadkin Junction for the other train, and none of them discovered the oversight until the moment the collision occurred. There was no discovery of the mistake of engineer Sigmon by the conductor or brakemen until the other train was upon them and it was too late for anybody to do anything to avoid the collision; and, since engineer Sigmon had committed the same act of negligence in forgetting the order to wait at Yadkin as the other members of the crew had done, and since his own negli-

gence and theirs were simultaneous, but his own more immediately connected with his death than theirs, it was held that his own negligence was the sole proximate cause of his fatal injury. But in the case at bar, the negligence of engineer Simpson in misreading order 132 as meaning that they should meet No. 18 at Stamps, instead of Second 18, was not simultaneous with the negligence of conductor DeMaine in refusing to pull the air and stop the train himself or to let his brakeman, Dorman, do it, after the train had pulled out on the main line and after both brakemen in the caboose with conductor DeMaine had reminded him that order 104 to hold their train on the siding at McNeil until No. 18 arrived was being violated and urged him to pull the air and stop the train. The said negligence of conductor DeMaine in refusing to stop the train or permit his brakeman, Dorman, to stop it, after his attention had been called by both of his brakemen to the perilous situation, occurred after the negligence of engineer Simpson had been committed and after the conductor had discovered the peril, and the said negligence of the conductor was, therefore, the sole proximate cause of the collision and of Simpson's death.

The only other case cited by counsel for petitioner in support of their said contention is *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139. In that case, Caldine was the conductor. His orders required him to hold his train at Bridgewater until train No. 15 had passed. Instead of obeying said order, he commanded the

motorman of his train to proceed out of Bridgewater without waiting for the arrival of train No. 15 and on account of Caldine's disobedience of his orders his train collided with train No. 15 and he was killed. His administrator sued the railroad company charging negligence on the part of the motorman in obeying the orders given him by conductor Caldine to proceed out of Bridgewater without waiting for the arrival of train No. 15. In holding that, under the facts of that case, Caldine's administrator could not recover for his death, this court said:

> "Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered."

If, in the instant case, conductor DeMaine had been killed and his administrator were suing the railroad company for his death, charging negligence on the part of brakeman Dorman for his failure to pull the air and stop the train, notwithstanding his failure to do so was in obedience to the orders given him by conductor DeMaine not to do so, then there would be a case similar to the Caldine case, *supra*, cited by petitioner. But in the case which the administratrix of the deceased engineer Simpson has brought for his death,

engineer Simpson did not order conductor DeMaine to commit the act of negligence complained of by respondent. It is true that engineer Simpson had, just prior to the time that said negligence of the conductor was committed, himself committed an act of negligence in misreading order 132 and pulling out upon the main line; but the perilous situation thereby created was expressly pointed out to conductor DeMaine by both of his brakemen in the caboose with him, and one of them urged the conductor to pull the air and stop the train and started to do so himself, but the conductor refused to let the brakeman pull the air and stop the train and refused to do so himself, but permitted the train to run 5,600 feet after the brakeman urged that the air be pulled and the train stopped before the fatal collision occurred.

The doctrine of the last clear chance, or discovered peril, has been fully recognized and upheld by this court; and it applies in every case where the defendant discovers the negligence of the plaintiff and the peril thereby created, in time, by the exercise of reasonable care after discovering such peril, to avoid the injury, but fails to use the means available to him to prevent the injury.

In *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, this court held (quoting syllabus):

> "Plaintiff's contributory negligence cannot exonerate defendant and bar plaintiff's recovery where defendant might, by the exercise of reason-

able care and prudence, have avoided its consequences."

In *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 428, this court said:

> "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, (having been first enunciated in *Davies* v. *Mann*, 10 Mees. & W. 546) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

And in *Chunn* v. *City & Sub. Ry.*, 207 U. S. 302, it was said:

> "Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The principle of law thus recognized by this court, on which respondent solely relied for recovery in this case, is sometimes called the doctrine of discovered peril; for it puts the duty upon everyone who discovers

another in a position of peril to use all the means reasonably in his power to prevent injury to the person in danger, however much that person may have been to blame in getting into the perilous situation.

The degree of the negligence of the person in peril, however gross, will not defeat his recovery for his injury, if the defendant had a reasonable opportunity to avoid the injury after discovering the peril.

This same principle of law is also sometimes called the doctrine of the last clear chance; for it makes it the duty of him who has the last clear chance to avoid an injury to do all he reasonably can do to prevent that injury, regardless of the negligence the one in peril may have committed in bringing about the dangerous situation.

The kind or degree of negligence of the person in peril whereby he has brought his peril upon himself is not material, and, however gross, it will not prevent his recovery for his injury, if the defendant, after discovering the danger in time to prevent the injury by reasonable use of the means at his command, has the last clear chance to avoid the harm and fails to do so. Under this rule, the comparison of negligence has no place. It is not a question of whose negligence is the *greatest*, but the question is, whose negligence is the *latest*?

This doctrine has also been called the humanitarian rule; for, when a person is found in peril, the law does not stop to inquire how great was his own

fault in bringing the danger upon himself, but demands that whoever finds another in danger shall make reasonable use of the means at his command to save another from peril, *even though the one in peril may* have brought the danger upon himself solely by his own gross negligence.

If this doctrine be applied only in cases where the person whose danger is discovered has been but slightly negligent in getting into the danger, and if, where a person is discovered in peril which it appears he has brought upon himself by his own gross negligence, those who discover him in such perilous situation may refuse to make reasonable effort to save him after so discovering his plight and excuse their conduct by saying the negligence of the victim of their apathy was so gross as to make his death a fitting punishment for his carelessness—then will humanity be taken out of this humanitarian rule, and the doctrine of discovered peril destroyed.

On page 11 of petitioner's brief, counsel say:

> "Even were the last chance doctrine applicable to a case of this kind, it is not applicable to this case because the conductor in the caboose did not know the engineer was violating the stop and wait order, or that there was an outstanding stop and wait order, until the very moment of the collision, when it was too late for him to do anything."

A statement of the undisputed facts shows that the conductor of the train was fully advised of the

situation and of the danger in time to have avoided the accident. No stronger evidence could be marshalled to establish *this fact than* the evidence produced in this case.

There was only one order given to the train crew on train 775 that referred to train No. 18, and that order was to meet train No. 18 at McNeil. The crew only received one order at McNeil, and this order did not refer to train No. 18, but was an order to meet second 18 at Stamps. When the two brakemen learned what order had been received at McNeil they knew at once that the train should not leave the side-track at McNeil. And before the train had scarcely started to move out on the main line, Brakeman Craig reminded the conductor that he had no orders permitting him to go out on the main line against No. 18, urged him to pull the air and stop the train, the conductor at the time having in his hand the only order received at McNeil and knowing that only one order had been issued against train No. 18, and that they had come to McNeil on it. After the train had gone out on the main line and the caboose had passed the switch, Brakeman Dorman came into the caboose and reminded the conductor that they were out on the main line against train No. 18, in violation of their orders, and realizing their extreme danger, did everything in his power to cause the conductor to act, and moved by the inaction of the conductor, started himself to pull the air and stop the train and was ordered by the conductor not to stop the train. The brakemen did all

in their power to avoid the danger. They were reasonable men and prudent men; they knew the danger; they wanted to act, and, had they possessed the power that the conductor did, the train would have been stopped and deceased would not have been injured, but the conductor, made aware of the danger, carelessly delayed action until it was too late. In so doing, he violated Rule No. 107 of the company, that states: "In case of doubt or uncertainty, the safe course must be taken" (Tr. 84). And also he violated all the laws of prudence and reason.

The train orders proclaimed the danger; the brakemen knew the danger; they told the conductor of the danger; as reasonably prudent men they wanted to act and avert the danger and save human life. The conductor, in utter disregard of the picture portrayed by the orders, by repeated urgings of the brakemen, refused to act and stood there "throwing dice with destiny" till the collision occurred, and in the eyes of the law, having the last chance to save human life, his negligence became the sole, proximate cause of the death of the deceased.

It is not disputed that had the conductor acted when Brakeman Craig conversed with him, when he urged him to pull the air and stop the train before they left the sidetrack, or later when Brakeman Dorman urged him to pull the air and stop the train after they were out on the main line, the danger would have been averted and the deceased would not have been killed.

The conduct of Conductor DeMaine, as shown by the evidence, brings this case squarely within the doctrine of the last clear chance, as that doctrine was defined in this case, in the case of *Kansas City Southern Ry. Co.* v. *Ellzey*, 275 U. S. 236. In its opinion in that case, on page 241, this court said:

> "This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine rightly applied in the Chunn case amounts to no more than this: That a negligent defendant will be held to be liable to a negligent plaintiff if the defendant, aware of plaintiff's peril, *or unaware of it only through carelessness*, had in fact a later opportunity than the plaintiff to avert the accident" (italics ours).

Respondent therefore prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANK PACE,

Counsel for Respondent.

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CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1931.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Petitioner,*

v. No. 674

EFFIE K. SIMPSON, as ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED, *Respondent.*

SUPPLEMENTAL BRIEF FOR RESPONDENT

FRANK PACE,
Counsel for Respondent.

DEMOCRAT P. & L. CO., LITTLE ROCK

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SUPPLEMENTAL BRIEF FOR RESPONDENT

In the brief for respondent in opposition to the petition for writ of certiorari, we answered the arguments made by opposing counsel in their brief in support of said petition; and, as we understand the briefs in support of the petition and our brief in opposition thereto will be considered by the court when the case is presented on its merits, we will stand upon our said brief in opposition to said petition as our answer to the arguments made in the original brief in support of the petition. But counsel filed a "reply brief of petitioner," and, as we have had no previous opportunity to answer the new arguments in said reply brief, and as counsel for petitioner have not filed any other or

supplemental brief since the writ was granted, we will, in this supplemental brief for respondent, answer the arguments made by counsel in the reply brief of petitioner, referring the court to the brief for respondent in opposition to the petition for the writ of certiorari for answer to all other arguments that have been advanced on behalf of petitioner.

On page 3 of said reply brief, counsel say:

> "Had the conductor stopped his train he could not thereby stop on-coming train 18 which, after making the curve, came into collision with the conductor's train. The stopping of one train would not stop the other, and it cannot be fairly said that the collision would have been avoided had Simpson's train been stopped by the conductor's applying the brakes when requested by the brakeman."

The undisputed evidence is that from the point where the engine of the south-bound train, of which Conductor DeMaine was in charge, would have been stopped had he pulled the air, or permitted Brakeman Dorman to pull it, when Dorman and Craig urged him to do so, to the point where the collision occurred was "a little more than half a mile," and that there was an "open view" throughout all that distance (R. 29, 51, 55, 57). The two trains were about the same size, each containing 43 or 44 cars (R. 45, 54). Either could have been stopped in 12 or 14 car lengths (R. 29). If Conductor DeMaine had stopped his train when Brakeman Dorman urged him to do so, the engineer and fireman on train No. 18 would have seen it when they came round the curve, more than half a mile away on

a straight, open track, and, of course, would have stopped their train as soon as possible, and, as they could have stopped it in 12 or 14 car lengths, or 500 or 600 feet (R. 29), there would have been a distance of more than 2,000 feet between the two trains when thus stopped, and the collision would have been avoided.

Counsel next say, on pages 4 and 5, that "recovery should have been denied because it was not shown the conductor discovered the peril in time to stop the train and avoid the collision." In answer to this contention of counsel we say, first, that, under the doctrine of the last clear chance, as that doctrine has been defined by this court, *actual knowledge* of the peril need not be shown, it being sufficient to show that the defendant either became aware of the plaintiff's peril, or that he had a reasonable opportunity to become aware of the plaintiff's peril, in time to have avoided the injury by making reasonable use of the means available to him, and that the defendant failed to make reasonable use of the means at his command to avoid the injury, after either actually becoming aware of the plaintiff's peril, or having reasonable opportunity to become aware of it; and, secondly, we say that the evidence in this case amply proves that Conductor DeMaine actually discovered the peril of Engineer Simpson in time to have avoided the fatal collision, had he made reasonable use of the means at his command after the peril was brought to his attention.

In support of the proposition that actual knowledge of the peril is not necessary to establish liability

under the doctrine of the last clear chance, but that it is enough to prove the defendant would have discovered the peril and avoided the injury had he exercised reasonable care to do so, we quote from the opinion of this court in *Kansas City Southern Ry. Co.* v. *Ellzey*, 275 U. S. 236, 241, as follows:

> "This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the Chunn case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril *or unaware of it only through carelessness*, had in fact a later opportunity than the plaintiff to avert an accident." (Italics ours.)

In the Ellzey case, *supra*, this court, referring further to the doctrine of the last clear chance, said:

> "The classic instance is that in which the plaintiff had improvidently left his animal tied in a roadway where it was injured by the defendant's negligent operation of his vehicle. *Davies* v. *Mann*, 10 M. & W., 546."

In *Davies* v. *Mann*, thus referred to by this court as "the classic instance" of liability based on the doctrine of the last clear chance, it was not proved that the driver of the vehicle that ran over and injured the plaintiff's animal had actual knowledge of the peril of the animal, or even of the presence of the animal; but, on the contrary, the evidence in that "classic" case tended to show the driver of the vehicle did not have actual knowledge of the peril of the animal that

was fettered in the road. We quote the following from the opinion in *Davies* v. *Mann*:

> "It appeared that the plaintiff, having fettered the fore feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of the road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and *it was proved that the driver of the wagon was some little distance behind the horses.* The learned judge told the jury that, though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." (Italics ours.)

The jury, in that case, did find for the plaintiff, and the verdict was affirmed.

It is seen that liability of the defendant in that classic case did not depend at all upon the defendant's having actual knowledge of the peril, or even of the presence, of the animal the plaintiff had negligently left fettered in the road, and that "it was proved that *the driver of the wagon was some little distance behind the horses,*" so that it was probable he did not

actually see the animal in the road at all until his wagon was upon it. But the defendant was held liable in that case because he was "unaware of it (the peril) only through carelessness," as was said by this court in the Ellzey case, *supra.*

Not only does the evidence in this case prove that Conductor DeMaine, if not aware of the peril of Engineer Simpson was "unaware of it only through carelessness," but it proves that the conductor must have actually discovered Simpson's peril in ample time to have stopped the train, or permitted it to be stopped, and avoided the collision. Conductor DeMaine had received order No. 104 when his train left Pine Bluff that morning, which told him to hold his train at McNeil until train 18 arrived. He knew no other order had been received permitting his train to proceed beyond McNeil, unless it was the order he received at McNeil. He knew only one order had been received at McNeil. That order directed his train to meet Second 18 at Stamps. That order, doubtless, misled him at first, just as it misled Engineer Simpson, into the belief that it referred to train 18, instead of Second 18; but the two brakemen, in the caboose with him, just as the train was moving out from the side track at McNeil, both reminded the conductor that, unless he had received some order on train 18 there, they had no right to leave the siding at McNeil, and the conductor told them only one order had been received at McNeil and it referred to Second 18 and not to train 18, and both of his brakemen then urged him to stop the

train, as it was going onto the main line against order 104, which required them to wait there for train 18. The conductor had the one and only order received at McNeil then in his hand, and he already knew that order 104 required him to hold his train at McNeil until 18 arrived, and, having in his hand the only order received at McNeil and having discussed it with his two brakemen, he knew it did not relate to train 18 at all and he, therefore, knew that his train was proceeding in violation of order 104 and that there was danger of a collision with train No. 18, unless he stopped his train, or permitted his brakeman to stop it. The evidence affirmatively showing that Conductor DeMaine had seen all the orders received by his train that day and the evidence also showing that one of these orders commanded him to hold his train at McNeil until No. 18 arrived, it is certain the conductor had actual knowledge, when he allowed his train to leave McNeil, that Engineer Simpson was in peril; and, in addition, both of his brakemen forcibly reminded him that the train was proceeding in violation of orders and in imminent danger of collision with train 18, and they urged him to pull the air in the caboose and stop the train, and Brakeman Dorman started to pull the air himself, but the conductor refused to permit him to do so. With all this knowledge already in his possession and with both his brakemen pleading with him to pull the air and stop the train or let them do so, he refused to do either, but called for his general orders from the cupola and stood looking at them from the

time the train started moving toward the main line until it had gone out onto the main line and more than a mile down the main line to where the collision occurred. The fact that he decided to examine fifteen or twenty orders before he acted, when he knew only one of them concerned his duty at McNeil and it told him to hold his train there for No. 18, and after both his brakemen had so reminded him, does not prove he did not know the perilous situation, but simply proves his failure to exercise reasonable care to avoid the collision after discovering the danger of it. The conduct of his two brakemen affords a standard for comparison in determining whether the conductor exercised ordinary care to save the men on the engine from death after he discovered their peril. The conductor had a better opportunity to discover the danger of the situation than his brakemen, for he had in his own hand the only order received at McNeil, the only order that could have given him any right to proceed before the arrival of train 18; and yet both these brakemen discovered the peril of the situation and pressed that knowledge upon the conductor and urged him to stop the train; he ignored their pleadings and refused to act or let them act to avoid the collision until his train had crept past the switch and gone more than a mile down the main line to where the collision occurred. His failure to act with the facts before him caused the collision and was not the conduct of a reasonably prudent man.

This negligence of the conductor not only violated his duty as prescribed by law under the doctrine of the

last clear chance, but it was a flagrant violation of his duty under rule 107 of the railroad company, which says: "In case of doubt or uncertainty, the safe course must be taken" (R. 84).

On pages 8 and 9 of said reply brief, counsel say: "The last clear chance doctrine does not apply where, as here, the engineer's negligent conduct continued with that of the conductor to the time of the collision."

In reply to this contention, we say that the negligent act of Engineer Simpson consisted of his misinterpreting the order received at McNeil, which directed them to meet *Second* 18 at Stamps. He undoubtedly misunderstood that order to mean for them to meet train 18 at Stamps. That act of negligence was committed when Simpson misinterpreted that order; and his train was then on the side track at McNeil. His proceeding onto the main line toward Stamps was not, in itself, an act of negligence. Such action would have been proper if the order received at McNeil had been what Simpson understood it was; so that Simpson committed only one act of negligence and that act was his misinterpretation of the order received at McNeil, and that act was committed when the order was received at the station at McNeil. And, therefore, Simpson's negligence did not continue to the time of the collision.

If it be argued that his presence on the main line when the collision occurred when he had no order permitting him to be there was itself an act of continuing

negligence, we answer that if recovery by plaintiff be denied on this ground then on the same ground recovery can be defeated in every case where the doctrine of the last clear chance is invoked and that doctrine will be completely destroyed, for, unless the person injured continues in the place of peril until the time of the injury he will not be injured in any case. It is only in cases where the party injured continues to occupy his perilous position until the occurrence of the injury that an injury can occur. If he himself discovers his own peril and corrects his error and gets out of his perilous situation before the injury has happened to him, then, of course, there will be no injury, and, hence, if it be held that the fact the injured party continues in his perilous position up to the time of the injury will defeat recovery, then it is obvious there could never be a recovery under this doctrine.

In *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, this court said:

> "But upon the question of the plaintiff's position and attitude the evidence was conflicting; and it was indisputable that the steamboat was approaching the wharf at his call, and for the purpose of receiving freight from his hands, and that her pilot and officers saw him as he waited on the wharf. The jury might well be of opinion that, while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steam-boat from striking the wharf with unusual and unnecessary

violence. If such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury."

In the Tolson case, *supra*, the negligent act of the person injured consisted in his placing himself in the position too near the edge of the wharf; and this court permitted him to recover, notwithstanding he continued in that position until the very time the boat struck the wharf and injured him. Then why should a recovery be denied in this case on the ground that Simpson continued on the main line until the collision occurred?

In the case of *Davies* v. *Mann, supra,* the act of negligence on the part of the plaintiff consisted in his turning his fettered animal onto the highway. He continued to leave his said animal still fettered upon the highway until the very moment when it was run over and killed by the defendant's wagon; yet, the court did not hold in that case that because the plaintiff continued to leave his animal in the place and condition in which his negligence had put him, the plaintiff could not recover for his injury.

If it be held in this case that the fact that Engineer Simpson continued on the main line, where it was negligence for him to go, until the collision occurred, defeats the right of his widow to recover for his death, then the English court was wrong in not holding in the case of *Davies* v. *Mann* that the fact the plaintiff in that case continued to leave his donkey fettered in the highway until the defendant's wagon

ran over it, did not defeat the plaintiff's right to recover for the death of the donkey, and this court was wrong in holding in the case of *Inland & Seaboard Coasting Co.* v. *Tolson, supra,* that the fact Tolson continued to stand too near to the edge of the wharf, where it was negligence for him to go, until the collision of the boat with the wharf occurred, did not defeat Tolson's right to recover for the injury to his foot.

On page 8 of said reply brief, counsel quote from the opinion of this court in the Ellzey case, *supra,* as follows:

> "The respondent and Merchant were engaged in a common venture, which, acting together, they were carrying on in a careless manner. In such a case their courses of conduct are not sufficiently independent to let it be said that either one or the other had in fact a later opportunity to avoid the consequences of their joint negligence."

And then counsel say that "the conduct of the engineer and the conduct of the conductor were not sufficiently independent to let it be said that either the one or the other had, in fact, a later opportunity to avoid the consequences of their joint negligence." But there is no similarity whatever between the facts in the Ellzey case, thus cited by counsel, and the facts in this case. In the Ellzey case, the man who was injured and the man whose negligence was alleged to have caused his injury were riding together in a motor car. They were in immediate contact with each other. All that either knew regarding the peril was also known to the other, or could readily and easily have been

made known to him. But such was not the situation of Engineer Simpson and Conductor DeMaine in this case. Simpson was on the engine at the front end of the train, while Conductor DeMaine was in the caboose at the rear end of the train. There were 43 box cars between them. It is true that each had a copy of the order they had received at McNeil, telling them to meet *Second* 18 at Stamps. Each had, doubtless, misread the order, when first getting it, as referring to train 18 instead of Second 18. Simpson then put the order in his pocket, where it was found after the collision; and never discovered his error until the collision occurred. But DeMaine kept this order in his hand and reread it and did discover that it did not refer to train 18; and both of his brakemen, in the caboose with him, forcibly reminded him, after they all saw that Simpson had been misled by the order and was pulling out onto the main line, that they were going against orders, and urged the conductor to pull the air and stop the train; and Brakeman Dorman started to pull the air himself and stop the train, but was ordered by the conductor not to do so.

If the conductor and his two brakemen had been in the engine cab with Engineer Simpson, so that Simpson could have had the same opportunity to discover his error in misreading the order that the conductor had, then this case would have been similar to the Ellzey case, cited by counsel; but Simpson did not have this opportunity to discover his error, which it is undisputed the conductor did have, and, hence, the

holding of this court in the cited case does not apply to the facts in this case.

Since Conductor DeMaine and Engineer Simpson were at the opposite ends of a long train and the conductor was in possession of a vital fact of which Engineer Simpson was ignorant,—that the order received at McNeil did not refer to train 18 but to *Second* 18, and that they were out on the main line in imminent peril of colliding with train 18— it cannot be said in this case, as contended by counsel, that Conductor DeMaine did not have an opportunity to avoid the consequences of the misreading of the order by Engineer Simpson.

In conclusion, we submit that the evidence in this case proves that respondent was entitled to recover under the humanitarian doctrine of the last clear chance, and that the judgment should be affirmed.

Respectfully submitted,

FRANK PACE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 674.—October Term, 1931.

St. Louis Southwestern Railway Company, Petitioner,
vs.
Effie K. Simpson, as Administratrix of the Estate of A. E. Simpson, Deceased.

On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[May 16, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

The administratrix of the estate of Simpson, an employee of the petitioner, brought this action under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, § 1; 35 Stat. 65; U. S. Code, Title 45, § 51) to recover damages for his death. She had a verdict in her favor in the Circuit Court of Prairie County, Arkansas, and the Supreme Court of the State affirmed. The case is here on certiorari.

Simpson was the engineer of No. 775, an extra train engaged in interstate commerce. Before leaving Pine Bluff, Arkansas, he received a written train order, No. 104, notifying him to proceed south to the cross-over at McNeil, Arkansas, and there wait upon a siding until another train, No. 18, going north, had arrived and passed. On arriving at McNeil, Simpson took his train, consisting of 43 freight cars, upon the siding at the cross-over, but did not wait there. He had received at McNeil another order (train order No. 132) notifying him that another train (second 18) was to meet him farther south at Stamps. The conjecture is offered that he confused train No. 18 with second No. 18, though there is no dispute that to a railroad employee the description was entirely intelligible, trains of the same number being designated as first, second, third and so forth. At all events, Simpson instead of waiting at the siding moved out upon the main track. About a mile away there was a head-on collision between his train and No. 18, in which he and others were killed.

The respondent admits, as she admitted on the trial, that the engineer was negligent and rests her right to recover upon what is characterized as the doctrine of "the last clear chance." To bring that doctrine into play she relies upon these facts: At the end of the long train of 43 freight cars was a caboose in which the conductor and two brakemen rode. The brakemen say that as the train left the siding, they remembered the first order and asked the conductor whether any new ones contradicting it had come into his hands. Not hearing of any, they called out to apply the air brakes, and one of them offered to do so himself. This the conductor forbade, and said to bring him the written orders which were in the cupola of the caboose, so that he might read them again. This was done at once. While the orders were in the conductor's hands and he was reading them again, the collision occurred.

The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this court in *Davis* v. *Kennedy*, 266 U. S. 147, might have been written of this case. "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury due to his failure to act on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more." See also *Unadilla Ry. Co. Co.* v. *Caldine*, 278 U. S. 139; *Frese* v. *Chicago, Burlington & Quincy R. R. Co.*, 263 U. S. 1, 3; *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, 448.

We do not need to inquire whether a different conclusion would follow if the conductor in the caboose had discovered that the engineer had gone upon the main track through a misunderstanding of a later order, and discovering this, had failed after a substantial interval of time to give warning of a peril that he could have easily averted. Nothing of the kind appears. There is an absence of the essential factors that wake into life the doctrine of the last clear chance. In the first place, the conductor did not know any more than Simpson did that an order had been violated. He was distrustful of his memory, and was looking at the written orders at the moment of the collision. Negligent he may have been, but not

recklessly indifferent to a duty to counteract a peril perceived and understood. *Woloszynowski* v. *N. Y. C. R. R. Co.*, 254 N. Y. 206; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558. In the second place, the negligence of the engineer and the negligence of the conductor were substantially concurrent. The negligence of the engineer was a continuing one (*St. Louis & San Antonio Ry Co.* v. *Schumacher*, 152 U. S. 77, 81), for he was under a duty from the moment that he went out on the main track to return to a place of safety. The negligence of the conductor in failing to give warning was not separated by any considerable interval from the consequences to be averted, nor is there any satisfactory proof that warning, if given, would have been effective to avert them. The transaction from start to finish must have been a matter of seconds only. In the brief for the respondent nice calculations are submitted in an attempt to prove that if the conductor had applied the brakes at once, his train could have been stopped at a point that would have separated it by a space of approximately half a mile from train No. 18 rushing on from the south, and that if all this had happened, the engineer of No. 18 might have noticed the stationary train in time to stop his own and thus prevent collision. Calculations so nice are unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent. *Kansas City Southern Ry.* v. *Ellzey*, 275 U. S. 236, 241.

The judgment should be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.